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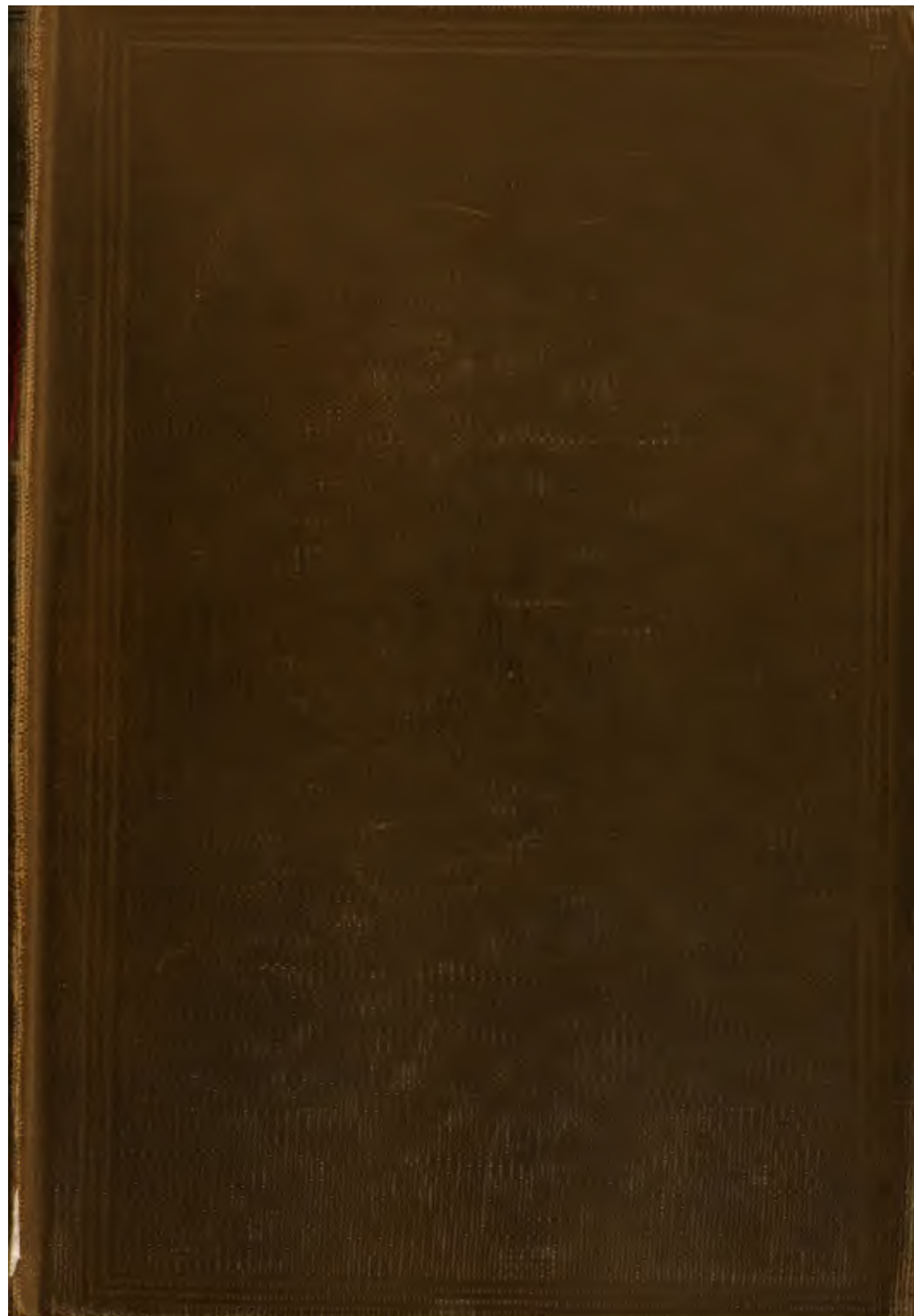
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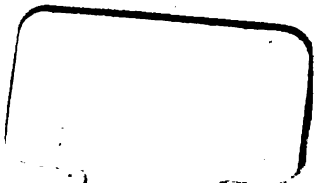
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Stanley Morrison



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A
SELECTION OF CASES
ON
MUNICIPAL CORPORATIONS

BY
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HARVARD UNIVERSITY

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PREFACE

IN 1898 Professor Jeremiah Smith published a short collection of "Cases on Selected Topics in the Law of Municipal Corporations," with special reference to the wants of his classes, where the time allotted for the subject did not exceed ten lectures. The growing importance of the subject has made it wise to increase the time devoted to study of the subject in many schools, and the time now commonly allotted to it is from thirty to forty lectures. This has made it desirable to prepare a case-book to cover the subject more fully than was possible in Professor Smith's book, and the task of preparation has fallen on the present editor.

The cases in the earlier book were so admirably selected that it would have been folly to make a new selection. Professor Smith placed them all at the service of the present editor, but preferred that his own name should not appear on the title-page. This collection, therefore, which ought to appear as a second edition of his book, or at least as a joint production, must purport to be the work of the undersigned; who takes occasion here to say, that of the 678 pages of cases here collected, 260 are taken without change, or with unimportant changes of arrangement, from the earlier collection, and to express his indebtedness for that fact, and for the even greater assistance he has derived from Professor Smith's learning and interest in the subject.

JOSEPH H. BEALE.

CAMBRIDGE, December 1, 1911.

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C A S E S
ON
MUNICIPAL CORPORATIONS.

CHAPTER I.
THE NATURE OF MUNICIPAL CORPORATIONS.

SECTION I. — *Distinction between Municipal Corporations and
other Corporations.*

CUDDON v. EASTWICK.

1704. 1 Salk. 192.

UPON a habeas corpus was returned an action of debt for the penalty of a by-law made by the common council of the city of London. The by-law was, that whereas the company and fellowship of porters had been time out of mind a company and fellowship, it was ordained, that they should still remain and continue forever a company and fellowship, and that no master of any boat, &c. from place to place, &c. should unload or send on shore any goods, but by such persons as were free of the said company: to which it was objected, 1st, That the City of London could not make a corporation. 2dly, That a corporation could not make a by-law to bind strangers, unless founded on public convenience. *Et per cur.* The city of London cannot make a corporation, for that can only be created by the crown; but this is only a fraternity, not a corporation, and a corporation may make a fraternity. A corporation is properly an investing the people of the place with the local government thereof, and therefore their law shall bind strangers; but a fraternity is some people of a place united together, in respect of a mystery and business, into a company, and their laws and ordinances cannot bind strangers, for they have not a local power or government.

INHABITANTS OF THE FOURTH SCHOOL DISTRICT IN
RUMFORD v. WOOD. 21816. 18 Mass. 198.¹

THIS was an action of the case in which the plaintiffs, by the name of "The inhabitants of the fourth school district in the town of Rumford in the county of Oxford," declared upon a promise and undertaking of the defendant, to erect a school house for the use of the plaintiffs upon the defendant's land, and to make a lease of the same land to the plaintiffs, for the consideration of 170 dollars paid him by the plaintiffs. The declaration contained also a count for money had and received by the defendant to the use of the plaintiffs.

The defendant pleaded in abatement, that the plaintiffs are not a corporation with power to sue.

The plaintiffs replied that, by a law of this commonwealth, entitled "An act to provide for the instruction of youth, and for the promotion of good education" (Stat. 1789, c. 19), and by the several laws enacted in addition to the act aforesaid, they are duly invested with all the powers of corporations, necessary to enable them to maintain their action &c.

To this replication the defendant demurred generally, and the plaintiffs joined in demurrer.

PARKER, C. J. This cause has been some time before us ; there having been, at the several consultations we have had upon it, doubts upon the mind of some or other of the court, as to the effect of the arguments submitted in writing : the counsel on both sides having well considered and ingeniously applied the legal principles and reasoning belonging to the subject.

We are all, finally, of opinion, that the plea in abatement is bad, and that a judgment of *respondeas ouster* must be entered. The objection contained in a plea is, that the plaintiffs, who are styled the inhabitants of the fourth school district in Rumford, have not that legal entity and capacity, which entitle them to maintain this or any other action. In other words, that they do not compose a corporate body : but are merely individuals, entitled to assemble for particular purposes, and to transact business by vote in the same manner as towns : but with no power to make contracts, or to enforce them by a suit at law, except perhaps in the special instance pointed out in the several statutes which regulate them.

That they are not bodies politick and corporate, with the general powers of corporations, must be admitted : and the reasoning and authorities, advanced to shew this defect of power, are conclusive. The same may be said of towns and other municipal societies, which, although recognized by various statutes and by immemorial usage, as persons or aggregate corporations, with precise duties which may be

¹ Arguments omitted. — Ed.

enforced, and privileges which may be maintained, by suits at law; are yet deficient in many of the powers incident to the general character of corporations.

They may be considered under our institutions as *qua* corporations; with limited powers coextensive with the duties imposed upon them by statute or usage: but restrained from a general use of the authority, which belongs to these metaphysical persons by the common law. The same may be said of all the numerous corporations, which have been from time to time created by various acts of the legislature: all of them enjoying the power, which is expressly bestowed upon them; and perhaps, in all instances where the act is silent, possessing by necessary implication the authority, which is requisite to execute the purposes of their creation.

They differ in character also from those corporations, which exist at common law, in some particulars. It is not necessary that our municipal corporations should act under seal, in order to bind themselves, or obligate others to them. A vote of the body is sufficient for this purpose: and this mode has prevailed with the proprietors of common and undivided land, even in the disposition of their real property, contrary to the general provision of law, respecting the transfer of real estate. It will not do, therefore, to apply the strict principles of law respecting corporations, in all cases, to these aggregate bodies which are created by statute, in this commonwealth.

By the several statutes, which have been passed respecting school districts, it is manifest that the legislature has supposed, that a division of towns, for the purpose of maintaining schools, will promote the important object of general education: and this valuable object of legislative care seems to require, in construing their acts, that a liberal view should be had to the end intended to be effected.

Respondeas ouster awarded.

METROPOLITAN RAILROAD v. DISTRICT OF COLUMBIA.

1889. 132 U. S. 1.

BRADLEY, J.¹ . . . It is contended by the plaintiff that it (the District of Columbia) is not amenable to the statute of limitations, for three reasons: first, because of its dignity as partaking of the sovereign power of government; secondly, because it is not embraced in the terms of the statute of limitations in force in the District; and, thirdly, because if the general words of the statute are sufficiently broad to include the District, still, municipal corporations, unless specially mentioned, are not subject to the statute.

1. The first question, therefore, will be, whether the District of

¹ Only an extract from the opinion is given. — Ed.

Columbia is, or is not, a municipal body merely, or whether it has such a sovereign character, or is so identified with or representative of the sovereignty of the United States as to be entitled to the prerogatives and exemptions of sovereignty.¹

Under these different changes the administration of the affairs of the District of Columbia and city of Washington has gone on in much the same way, except a change in the depositaries of power, and in the extent and number of powers conferred upon them. Legislative powers have now ceased, and the municipal government is confined to mere administration. The identity of corporate existence is continued, and all actions and suits for and against the District are preserved unaffected by the changes that have occurred.

In view of these laws, the counsel of the plaintiff contend that the government of the District of Columbia is a department of the United States government, and that the corporation is a mere name, and not a person in the sense of the law, distinct from the government itself. We cannot assent to this view. It is contrary to the express language of the statutes. That language is that the District shall "remain and ~~continue a municipal corporation,~~" with all rights of action and suits for and against it. If it were a department of the government, how could it be sued? Can the Treasury Department be sued? or any other department? We are of opinion that the corporate capacity and corporate liabilities of the District of Columbia remain as before, and that its character as a mere municipal corporation has not been changed. The mode of appointing its officers does not abrogate its character as a municipal body politic. We do not suppose that it is necessary to a municipal government, or to municipal responsibility, that the officers should be elected by the people. Local self-government is undoubtedly desirable where there are not forcible reasons against its exercise. But it is not required by any inexorable principle. All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative discretion. Commissioners are not unfrequently appointed by the legislature or executive of a State for the administration of municipal affairs, or some portion thereof, sometimes temporarily, sometimes permanently. It may be demanded by motives of expediency or the exigencies of the situation; by the boldness of corruption, the absence of public order and security, or the necessity of high executive ability in dealing with particular populations. Such unusual constitutions do not release the people from the duty of obedience or from taxation, or the municipal body from those liabilities to which such bodies are ordinarily subject. Protec-

¹ The Court here described the various changes in the local government of the District.

tion of life and property are enjoyed, perhaps in greater degree than they could be, in such cases, under elective magistracies; and the government of the whole people is preserved in the legislative representation of the State or general government. "Nor can it in principle," said Mr. Justice Hunt in the *Barnes* case, "be of the slightest consequence by what means these several officers are placed in their position, whether they are elected by the people of the municipality or appointed by the President or a governor. The people are the recognized source of all authority, State and municipal, and to this authority it must come at last, whether immediately or by a circuitous process." *Barnes v. District of Columbia*, 91 U. S. 540, 545.

One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State or sovereignty according to the definition of writers on public law, being a distinct political society. This position is assented to by Chief Justice Marshall, speaking for this court, in the case of *Hepburn v. Ellzey*, 2 Cranch, 445, 452, where the question was whether a citizen of the District could sue in the circuit courts of the United States as a citizen of a State. The court did not deny that the District of Columbia is a State in the sense of being a distinct political community; but held that the word "State" in the Constitution, where it extends the judicial power to cases between citizens of the several "States," refers to the States of the Union. It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense. No more than this was meant by Chief Justice Taney, when, in the *Bank of Alexandria v. Dyer*, 14 Pet. 141, 146, he spoke of the District of Columbia as being formed, by the acts of Congress, into one separate political community, and of the two counties composing it (Washington and Alexandria) as resembling different counties in the same State; by reason whereof it was held that parties residing in one county could not be said to be "beyond the seas," or in a different jurisdiction, in reference to the other county, though the two counties were subject to different laws.

We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons.

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O'LEARY v. BOARD OF FIRE AND WATER COMMISSIONERS. 4

1890. 79 Mich. 281.

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CAMPBELL, J.¹ . . . The defendant was incorporated by "An act to create a board of water commissioners in the village of Marquette, and to define its powers and duties," approved March 2, 1869. The subsequent incorporation of the city merely made the necessary changes to meet the change in government. Although not in terms declared to be a corporation, the powers given them are in such language as to make them such. They are liable, as well as competent, to be impleaded, to make contracts, and hold property, to have a seal, and make by-laws, and generally "to do all legal acts which may be necessary and proper to carry out the effect, intent, and object of this act." As all of their powers are confined legally to the scope of the statute, it is necessary to consider them. The members derive their appointment from the corporate body of the city, and not from the people. By section 6 they are required —

Powers

"To examine and consider all matters relative to supplying said [city] of Marquette with a sufficient quantity of pure and wholesome water for domestic use, also to provide suitable and efficient means for the extinguishment of fires."

This is the general and sole purpose of all their incidental powers. (1) By subsequent sections they are empowered, under approval of the electors by vote on that question, to issue bonds to a limited extent, and, if unable to pay, to renew them. (2) They are authorized to report to the city council, which is empowered, but not expressly required, to raise by tax any sums beyond the revenue of the board necessary to pay principal or interest on the bonds, or "any deficiency in operating expenses." They are authorized, "after the necessary means have been procured, as herein provided, to purchase necessary lands and materials, and construct reservoirs, buildings, machinery, and fixtures to supply water, and to provide means for fire protection, and are given, for the purposes of the "fire department," the powers which were before possessed by the village. They are empowered to lay pipes for water, and to build hydrants, and to employ such persons as they deem necessary to perform their duties. (4) They have power to levy water-rates on consumers on an equitable basis. (5) They can procure lands by condemnation, where needed, and, on payment of the damages into the city treasury, may get the title. All materials contracted for or procured by them are exempt from execution.

It may be important, in this connection, to consider the legal position of this board in its functions. While it is a local corporation, created to serve municipal purposes, it is in no sense a municipal cor-

¹ Part of the opinion only is given. — Ed.

poration, within the legal meaning of that term. It has been settled in this State that there can be no municipal corporation that is not the direct representative of the people of its locality. *Attorney General v. Councilmen*, 58 Mich. 213 (24 N. W. Rep. 887); *Allor v. Auditors*, 43 id. 76 (4 N. W. Rep. 492); *People v. Hurlbut*, 24 id. 44; *Board v. Auditors*, 68 id. 576 (36 N. W. Rep. 743); *Commissioners v. Detroit*, 28 id. 228; *Attorney General v. Detroit*, 29 id. 108; *Buller v. Detroit*, 43 id. 552 (5 N. W. Rep. 1078). In several of these as in other cases the doctrine has been recognized that the establishment of corporations to act as municipal boards or agencies did not give them any governmental municipal authority; and it is difficult to see how the incorporation or non-incorporation of the same board can change its character in the performance of public duties. The furnishing of water and the establishment of a fire department are among the almost universal functions of cities; and the incorporation of water and fire boards appointed by the city is only a convenient way of removing that business from the constant interference of the ordinary city authorities, with such safeguards as are deemed best for that purpose.

It was held in *Detroit v. Blackeby*, 21 Mich. 84, that cities and municipalities are not usually responsible in damages for the neglect of persons in public office, unless made so by statute; and it has been held in numerous cases since that the statute liability cannot be enlarged. *Detroit v. Putnam*, 45 Mich. 263 (7 N. W. Rep. 815); *McKellar v. Detroit*, 57 id. 158 (23 N. W. Rep. 621); *McArthur v. Saginaw* 58 id. 357 (25 N. W. Rep. 313); *Williams v. Grand Rapids*, 59 id. 51 (26 N. W. Rep. 279); *Keyes v. Village of Marcellus*, 50 id. 439 (15 N. W. Rep. 542). On the other hand, it was held in *Detroit v. Corey*, 9 Mich. 165, that where a city is engaged in making a work which is its private property as a municipality, and not a mere public easement, and done under city employment or contract, it is responsible for injuries caused by neglect in its process of construction, as it is for any such action as directly injures private property. *Pennoyer v. Saginaw*, 8 Mich. 534; *Ashley v. Port Huron*, 35 id. 296; *Defer v. Detroit*, 67 id. 346 (34 N. W. Rep. 680). But it is not usually liable in other cases. If this defendant was the representative directly of the people of Marquette to govern the city, with power to tax the people to carry out its plans, and held the property in its charge by proprietorship for its own purposes, it would seem to come within the *Corey* case. But a city represents the people for all the strict purposes of local government, and has power to raise its own revenue. The Legislature, in requiring towns, cities, and villages to answer in damages for neglect to keep roads in repair, at the same time found it necessary to remove one of the recognized difficulties arising from lack of funds, by enabling them to provide by taxation for all such purposes. The purposes for which the present municipal agency was created are entirely for the protection of the city from fire, and for promoting its health by a supply of good water. The defendant is

only enabled to obtain and hold such property as will be instrumental to that end. Every seizure of such property, if allowed, would be a diminution of the power of defendant to perform its public duties in regard to public health and safety. It not only has no taxing power, but the city has no power to give it any taxes, except such as will enable it to pay its bonds, and "meet any deficiency in operating expenses." Its property is not subject to execution. It cannot be true that such an agency can be officially liable to suits for liabilities, where it has no legal means of raising funds for payment. As already suggested, unincorporated boards are not so liable; and there is no obvious reason why the mere fact of incorporation, with no change of powers, can change their liabilities.

We cannot consider, on this record, any other question but the liability of this board. We know of no other instance in which a public board can be subjected to suit without means of raising money from the tax-payers. It is for the Legislature to determine how far, if at all, a body whose negligence, if it is so called, is imputed, and in no sense actual, shall be made subject to suit for the misconduct of its employés. There are many cases where such liability does not exist, except against the immediate individual wrong-doer. The person injured is not harmed any more where there are several persons liable than where there is only one. Imputed negligence is purely a question of public policy, and subject to legislative regulation. No one can be bound by this record, except the immediate parties to it, and it would be improper to go beyond it.

The judgment should be reversed, with costs, and without a new trial.¹

WEST CHICAGO PARK COMMISSIONERS v. CHICAGO.

1894. 152 Ill. 392.

BAILEY, J.² This is an appeal by the West Chicago Park Commissioners from a judgment of the county court of Cook county, confirming a special assessment upon the lands embraced in Douglas Park, one of the parks under the control of the appellants, to pay the cost of a street improvement, the improvement consisting of the erection of nineteen boulevard lamps on California avenue, between Twelfth street and Ogden avenue. The amount of the assessment in question is \$128.50, and it was stipulated by the parties in the court below, that if the assessment should be held to be valid in law, that should be deemed the correct amount of benefits to be assessed upon the park property for the improvement, but it was further recited in the stipulation that the case was selected out of a large number of similar cases pending, for special

¹ See *Overseers of the Poor v. Sears*, 23 Pick. 122. — Ed.

² Arguments and part of opinion omitted. — Ed.

assessments made by the city of Chicago upon the West Chicago parks, involving in all considerable amounts, for the purpose of getting a decision on the law questions involved. In this court it is admitted that the case is brought here as a test case, for the purpose of settling the question of the power of the city of Chicago to assess the lands embraced in the parks and boulevards under the control of the appellants, for the improvement of streets adjacent thereto or abutting thereon.

The appellants appeared before the county court and interposed a large number of objections to the confirmation of the assessment, all of which were overruled, and all the questions of law which we shall find it necessary to discuss were thereby properly raised.

The West Chicago Park Commissioners hold their office and exist as a municipal corporation under the provisions of an act of the General Assembly, entitled "An act to amend the charter of the city of Chicago, to create a board of park commissioners, and authorize a tax in the town of West Chicago, and for other purposes," approved and in force February 27, 1869, and of various other subsequent acts supplemental thereto or amendatory thereof. The act, after amending the charter of the city of Chicago, by providing for an enlargement of its boundaries by adding thereto a considerable amount of adjacent territory, including that which was afterward embraced in the West Chicago parks, provided, among other things, that seven persons, resident freeholders and qualified voters of the town of West Chicago, who should be designated by the Governor, should be, and they were thereby, constituted a board of public park commissioners for that town, to be known under the name of the "West Chicago Park Commissioners," their term of office to be seven years, and they were required to qualify by taking an official oath and by giving an official bond, and to organize as a board by electing one of their number president, and by appointing a secretary and treasurer, and by adopting a common seal, and it was provided that "the said board of commissioners shall be a body politic and corporate, with perpetual succession, and power to sue and to be sued, plead and be impleaded, to have and use a common seal, and they shall have and enjoy all the powers necessary for the purposes of this act."¹

In view of these various statutory provisions, it is perfectly plain that the West Chicago Park Commissioners are a municipal corporation, created for the purpose of laying out, establishing, improving and maintaining certain parks, boulevards and ways within the territorial limits of the city of Chicago, and that it is given full and exclusive power and authority, not only to lay out and improve, but also to govern, regulate, manage, control and direct the same, and that its power and authority in all these respects are plenary, and exclusive of that of the city of Chicago.

¹ The Court then quoted other statutory provisions.

Some question is made as to its rank and position as a corporation, — that is, whether it is to be regarded as a municipal corporation in the full and proper sense of the term, or merely what is called a *quasi* municipal corporation. While the settlement of this question is perhaps not of controlling importance, it may aid somewhat in the solution of some of the propositions presented for our consideration in this case, and we will therefore take the time to consider it briefly.

As we have already seen, by the act of February 27, 1869, under which the commissioners were originally organized, they were declared to be a body politic and corporate, and were afterwards spoken of in the act as a "corporation," and they were endowed with the usual attributes of a corporation, viz. that of perpetual succession, the power to sue and to be sued, to plead and be impleaded, to have a common seal, and they were vested, in general terms, with all the powers necessary for the purposes of the act. Among the powers specifically given were the power to make and enforce ordinances; to appoint and employ a police force; to levy taxes for municipal purposes; to acquire, by purchase, condemnation or otherwise, the lands necessary for the formation of parks, boulevards and ways; to improve, beautify and maintain the same, and hold the title thereto in perpetuity, for the benefit of the inhabitants of the town of West Chicago and of the public, as public promenade and pleasure grounds and ways, and to pay the cost and expenses thereby incurred by special assessments upon the property deemed to be benefited thereby; and it was further expressly provided, that in regard to its parks, boulevards and ways the board should possess all the power and authority conferred by law upon or possessed by the common council of the city of Chicago in respect to the public squares, places and streets of the city, but without power to sell, alien, mortgage or incumber the same.

That, within the scope of the purposes for which it was created, the corporation possesses all the powers of a municipal body does not seem to admit of serious doubt. And not only is this so, but it was called into being and its organization was effected, not by mere act of the sovereign legislative will, but by the express assent of the people over which its jurisdiction extends. As we have already seen, by the terms of the act of incorporation the question whether the act should take effect, and the park board become thereby incorporated, was submitted to the vote of the legal voters of the territory to be embraced within the park district, and only upon an affirmative vote, expressing the voluntary consent of the people of the district, did the act become effectual or the incorporation take place. The Park act did not create the corporation of its own force, but it had the effect only of an enabling act, under which the inhabitants of the district could organize themselves into a municipal corporation if they should see fit. The corporation therefore exists, not as a mere result of an exercise of the sovereign legislative will, but by virtue of the voluntary action of the people composing it.

Municipal corporations, such as cities and villages incorporated under special charters or voluntarily organized under general incorporation laws, are called into existence either at the direct solicitation or by the free consent of the persons composing them, while *quasi* municipal corporations, sometimes called involuntary corporations, such as counties, etc., are only local organizations, which, for the purposes of civil administration, are invested with a few of the characteristics of corporate existence. They are local subdivisions of the State, created by the sovereign legislative power, of its own sovereign will and without any particular solicitation, consent or concurrent action of the people who inhabit them. *Hamilton County v. Mighels*, 7 Ohio St. 109; *Finch v. Board, etc.*, 80 id. 37; *Askew v. Hale*, 54 Ala. 639; *Williamsport v. Commonwealth*, 84 Pa. St. 487; *Harris v. Board of Supervisors*, 105 Ill. 445; *Hollenbeck v. Winnebago County*, 95 id. 148; *Town of Waltham v. Kemper*, 55 id. 346; 1 Dillon on Mun. Corp. sec. 22, et seq.; 15 Am. & Eng. Ency. of Law, 954, and cases cited in notes.

Applying the foregoing test, — a test which seems to be abundantly sustained by all the authorities, — it follows, logically and necessarily, that the corporation in question falls within the class known as municipal corporations, properly so called, and not that of *quasi* or involuntary municipal corporations. But our attention is called to the fact that this court, in former decisions, in speaking of this identical corporation and other similar corporations, has called them *quasi* municipal corporations. This was the case in *People v. Salomon*, 51 Ill. 37, *Wilcox v. People*, 90 id. 186, *West Chicago Park Comrs. v. Western Union Tel. Co.* 103 id. 33, and *Kedzie v. West Park Comrs.* 114 id. 280. In other cases they are spoken of as municipal corporations, without any qualifying word. *People v. Walsh*, 96 Ill. 232; *South Park Comrs. v. Dunlevy*, 91 id. 49. On examining these cases, however, it will be found that in none of them was there any attempt to discriminate between municipal and *quasi* municipal corporations, nor any occasion for so doing. In *People v. Salomon*, in which the term *quasi* municipal corporations was first applied to these bodies, the question was as to the validity of the provisions of the Park act vesting the park board with power to levy and collect taxes within the park district, and for the purposes of that question all that was necessary to determine was, that the park board was at least a corporate authority *quasi* municipal, and the subsequent cases in which the same term has been applied to these corporations have simply followed the *Salomon* case, and none of them have been of such character as to call for an accurate discrimination in the use of terms.

It in no way militates against the view that the park board is a municipal corporation properly so called, that the objects and powers of the corporation are limited to the matter of creating, improving, embellishing and maintaining, in perpetuity, a system of parks, boulevards and ways. The powers of every municipal corporation are

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necessarily more or less limited, and the scope and extent of their corporate powers, and their limitations, are always matters of legislative discretion. But the number and scope of the objects for which a public corporation is organized do not, and have never been held to, constitute the test by which to determine whether the organization is a municipal corporation properly so called, or only a quasi municipal corporation. The park board, within the purview of its powers, is a corporation endowed with the same corporate functions, derived from the same source, and exercised in substantially the same way, as the city of Chicago. It is in no sense a corporation organized to exercise a portion of the municipal powers and functions of the city, and in subordination to it, but, within its own sphere, it has the same rank, and the exercise of its corporate powers is as exclusive of any power on the part of the city to interfere, as if the two corporations occupied wholly separate areas of territory.

By the terms of the Park act, the park board is given "full and exclusive power" to govern, manage and control all parks, boulevards and ways authorized by the act. By the several supplemental acts under which the board acquired authority to take possession of and control certain existing parks in the town of West Chicago, and the streets adjacent to its parks, and other streets to be selected for the purpose of forming connections between its parks and other portions of the city, those parks and streets were transferred from the jurisdiction of the city of Chicago, and were placed under the exclusive power and control of the park board, the same as the parks and boulevards originally laid out and improved by it. It follows that the power of the park board over all these parks, boulevards and streets, for the purposes prescribed by these statutes, is plenary, while that of the city is wholly excluded. And this exclusion, so far as it relates to any power on the part of the city to govern, manage, control or interfere with these parks, boulevards and streets as such, is as complete as it would have been if the parks, boulevards and streets had been wholly withdrawn from the territorial limits of the city. Indeed, the legal effect of the various park acts would seem to be to take them out of the territorial jurisdiction of the city, so that, so far as the power of the city in relation to them is concerned, the corporate organization of the city is practically dissolved.

It is a well recognized principle of law, that there cannot be at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdiction and privileges. 1 Dillon on Mun. Corp. (4th ed.) sec. 184. In Wilcox on Municipal Corporations, 27, it is said: "A corporation may be created in any place where there is not an existing corporation for municipal government, even where there has formerly been one, if it be now dissolved. But there cannot, at the same time, be two corporations in the same place, having the same or similar powers, privileges and jurisdiction." So in Grant on Corporations, 18, the rule is laid down as follows:

"There appears to be no limit to the power of the crown to grant a charter of municipal incorporation, as regards the size or the character of the town to be incorporated. This rule must, however, be observed for the sake of order and peace, viz. that there cannot be two corporations for the same purposes, with co-extensive powers of government, extending over the same district."

The same doctrine is laid down in *Taylor v. City of Fort Wayne*, 47 Ind. 274, and it is there said that "the proposition that two independent governments cannot exercise the same powers within the same district at the same time is a self-evident one." To same effect see *Strosser v. City of Fort Wayne*, 100 Ind. 443; *State v. Town of Winter Park*, 25 Fla. 371; *City of Paterson v. Society, etc.*, 24 N. J. L. 385; *King v. Pasmore*, 3 T. R. 199; 15 Am. & Eng. Ency. of Law, 1007.

We do not intend to intimate that, in the exercise of other municipal powers and functions, the city is excluded from jurisdiction over the park property, but only that, so far as relates to the laying out, improvement, management and control of the parks, the jurisdiction of the park board is exclusive. For all the purposes, then, of laying out, improving and maintaining parks, boulevards, streets and like public grounds, the city and the park commissioners occupy the legal position of two independent and co-equal municipalities, each vested with exclusive jurisdiction over the public grounds committed to its care, as trustee for the public. Neither can encroach upon the territorial jurisdiction of the other, but they stand, so far as these public grounds are concerned, in substantially the same legal relation to each other as though their territorial limits embraced adjoining but wholly separate areas. So far, then, as relates to all questions of street improvements, the West Chicago parks and boulevards are no more to be considered as a part of the city of Chicago than they would be if they were situate within the adjoining city of Evanston.

[The Court then held that the parks were for the benefit of all persons in the entire city; that the Commissioners had no power to raise money to pay assessments and taxes; and that the assessment in question was without legal authority.]

Judgment reversed.

SECTION II. — *Functions of Municipal Corporations.*

BAILEY v. MAYOR OF NEW YORK.

1842. 3 Hill, 531.

Action on the case against the City of New York for the destruction of property of the plaintiff by the construction of water-works for the city.¹

¹ This statement of facts is substituted for that of the Reporter. An extract from the opinion only is given. — Ed.

NELSON, C. J. The principal ground taken at the circuit against this action, and the one upon which it is understood the cause there turned was, that the defendants were not chargeable for negligence or unskilfulness in the construction of the dam in question; inasmuch as the water commissioners were not appointed by them, nor subject to their direction or control. In other words, the commissioners not being their agents in the construction of the dam, the rule *respondet superior* could not properly be applied.

Another ground is now taken, which I will first notice, viz. that admitting the water commissioners to be the appointed agents of the defendants, still the latter are not liable, inasmuch as they were acting solely for the state in prosecuting the work in question, and therefore are not responsible for the conduct of those necessarily employed by them for that purpose. We admit, if the defendants are to be regarded as occupying this relation, and are not chargeable with any want of diligence in the selection of agents, the conclusion contended for would seem to follow. They would then be entitled to all the immunities of public officers charged with a duty which, from its nature, could not be executed without availing themselves of the services of others; and the doctrine of *respondet superior* does not apply to such cases. If a public officer authorize the doing of an act not within the scope of his authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ. *Hall v. Smith*, 2 Bing. 156; *J. B. Moore*, 226, S. C.; *Humphreys v. Mears*, 1 Man. & Ryl. 187; *Bolton v. Crowther*, 4 Dowl. & Ryl. 195; *Harris v. Baker*, 4 Maule & Selw. 27.

But this view cannot be maintained upon the facts before us. The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special, private franchise, made as well for the private emolument and advantage of the city, as for the public good. The state, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment under the law and the revenue and profits to be derived therefrom, are a part of the private property of the city; as much so as the lands and houses belonging to it, situate within its corporate limits.

The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body — such as are granted exclusively for public purposes to counties, cities, towns and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to dis-

tribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, quoad hoc, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred. *Dartmouth College v. Woodward*, 4 Wheat. 668, 672; *Philips v. Bury*, 1 Ld. Raym. 8; 2 T. R. 352, S. C.; *Allen v. McKeen*, 1 Sumner, 297; *The People v. Morris*, 13 Wend. 331, 338; 2 *Kent's Com.* 275, 4th ed.; *U. S. Bank v. Planters' Bank*, 9 Wheat. 907; *Clark v. Corp. of Washington*, 12 id. 40; *Moodalay v. The East India Co.*, 1 Brown's Ch. R. 469. Suppose the legislature, instead of the franchise in question, had conferred upon the defendants banking powers or a charter for a rail-road leading into the city, in the usual manner in which such powers are conferred upon private companies; could it be doubted that they would hold them in the same character, and be subject to the same duties and liabilities? I cannot doubt but they would. These powers in the eye of the law, would be entirely distinct and separate from those appertaining to the defendants as a municipal body. So far as related to the charter thus conferred, they would be regarded as a private company and be subject to the responsibilities attaching to that class of institutions.

STATE EX REL. GEAKE v. FOX.

1902. 158 Ind. 126.

HADLEY, J.¹ Claiming to act by authority of a statute approved March 7, 1901 (Acts 1901, p. 132), the Governor appointed the relators commissioners of the board of public safety for the city of Fort Wayne, to take charge of the police and fire departments. The act required the commissioners to execute bonds for the faithful performance of their official duties, to be approved by and filed with the comptroller. Relators tendered proper bonds, and appellee, as comptroller, refused to approve and file them solely on the ground that the act was unconstitutional. Thereupon the relators filed their application for a writ of mandamus to compel appellee to approve and file their bonds. Demurrers were sustained to the application and alternative writ. The only question involved is the constitutionality of that part of the act which relates to the appointment of the board of public safety.

¹ Part of the opinion only is given. — Ed.

It should be remembered that municipal corporations are instituted by legislative authority for a two fold purpose: (1) As state governmental agencies, to assist the State in their localities in the administration and execution of such laws as pertain to the people of the State at large; (2) for the promotion of certain exclusively local interests which are peculiar to concentrated population, and in which the State, except in conferring the power and regulating its exercise, has no more right of interference than it has with the private affairs of its several inhabitants.

With respect to the first, there are important powers delegated to municipalities which concern every citizen of the State, and for the proper exercise of which the State cannot abdicate responsibility by committing them to local officers. It is very clear, from the tenor of the whole instrument, that the Constitution makers never intended that the territorial divisions recognized, — that is, counties, townships, and towns, should govern themselves, independently of State supervision or of State supremacy, but in every matter which affects the safety, morals, health, or general welfare of the people at large, or of a considerable number of them, there is undoubtedly reserved in the State the power to supervise, control, and even coerce local officers in the discharge of public duties, and even to send its own agents into any organized district, if necessary, to enforce a public right, or accomplish a public benefit. For instance, every citizen has the right to travel the public highways, — those in cities and towns, where, according to common usage, they are made, dug up, and improved by local action, as well as those in rural districts. In every part of these highways the traveler is entitled to the State's protection from violence, and from dangerous situations. For the preservation of the public health, for the prevention of disease and epidemics, each inhabitant has an interest in the proper drainage of lands, and in the suppression of all unsanitary conditions, whether rural or urban, and without regard for territorial boundaries, and the right to look to the State for protection against these evils so far as the same may be legally afforded. Likewise the enforcement of the State's criminal and revenue laws are of equal importance to all. In all these, and kindred things, the setting up of corporation lines forms no barrier to the strong arm of the State in safeguarding every public interest.

With respect to the second, each municipality organized under State authority is a distinct entity and factor in the State government, as an individual is an entity and factor. And while the Constitution and laws impliedly give the individual the right to acquire property for his own benefit, and guarantees to him its enjoyment, the same power that gives the municipality the right to exist gives also, in express terms, the right to contract and acquire such property as it may deem beneficial or conducive to the greater comfort and happiness of its citizens, such as parks, halls, hospitals, arts, charities, and appliances for protection against fire. These are strictly private possessions, lawfully

held. They are bought and paid for by the people of the city. They neither add to, nor diminish the burdens of the State, or any part of it, outside the corporation. The city's absolute, separate, and distinct tenure of such property is not different from the holding of like property by an individual. Can the property of one be sequestered by the State and not of the other?

As applied to this particular case the citizens of Fort Wayne had provided themselves with such means for protection against fire as they approved, and thought they could afford. Does it make any difference to the citizens of Marion county, or to the citizens of Allen county, outside the city limits, what these means are? The law does not require the city to provide any protection against fire. The matter is wholly voluntary. And in exercising its judgment in the matter, if the city has chosen hand or chemical engines propelled by volunteers, or if it has provided the most powerful steamers, and strongest and fleetest horses, and paid for them by contributions from its own citizens, by what right may the State arbitrarily assume the possession and control, to the exclusion of the city? In whose behalf does the State act in such a proceeding? There is a vast difference in the right to make laws and create offices for the uniform management of municipal property, and the right to fill the offices and exercise the management. The one is legislative; the other executive.

CHAPTER II.

EXTERNAL CONSTITUTION.

SECTION I. *Creation, Alteration and Dissolution.*

BERLIN v. GORHAM.

1856. 34 *New Hampshire*, 266.¹

ASSUMPSIT, to recover for supplies furnished for the support of Jeremiah Harding, and his wife Nancy Harding, alleged to be paupers having their settlement in Gorham.

The plaintiffs gave evidence that when Gorham was incorporated, on the 18th of June, 1836, Jeremiah Harding resided and had his home in the place which was incorporated into that town. The court ruled that if he so resided, he would thereby gain a settlement in Gorham, although no legal town meeting was holden, and though no town officers were chosen, before his removal.

The defendant excepted to the foregoing ruling, and moved that the verdict returned for the plaintiffs be set aside.

Bellows & Fletcher, for defendant.

G. C. Williams, for plaintiff.

BELL, J. By the statute of 1828, (Laws, Ed. 1830, p. 301,) relating to the settlement of paupers, which is reenacted without material change in the Revised Statutes, ch. 65, sec. 1, cl. 6, (Comp. Stat. 157,) "all persons, dwelling and having their homes in any unincorporated place at the time when the same shall be incorporated into a town,

¹ Only so much of the case is given as relates to a single point. The arguments are omitted. — ED.

shall thereby gain a settlement therein." It was objected that to make an incorporation of a town effectual, there must be a legal town meeting holden in it; and as the pauper, though he resided in the town at the passage of the act, removed before any meeting was holden, he did not gain a settlement. This objection rests upon the idea that the rule which applies in the case of private corporations, that the act is ineffectual until it is accepted by the corporators, governs also the case of public corporations, like towns. See A. & A. on Corp. 68.

But there is no such rule in the case of public corporations of a municipal character. The acts of incorporation are imperative upon all who come within their scope. Nothing depends upon consent, unless the act is expressly made conditional. No man who lives upon the incorporated district can withdraw from the corporation, unless by a removal from the town; and by the mere passage of the law the town is completely constituted, entitled to the rights and subjected to the duties and burdens of a town, whether the inhabitants are pleased or displeased. The Legislature has entire control over municipal corporations, to create, change, or destroy them at pleasure, and they are absolutely created by the act of incorporation, without the acceptance of the people, or any act on their part, unless otherwise provided by the act itself. *The People v. Wren*, 4 Scam. 269; *Warren v. Mayor, &c. of Charlestown*, 2 Gray, 104; *Mills v. Williams*, 11 Iredell, 558; *The State v. Curran*, 7 Eng. 321; *Fire Department v. Kip*, 10 Wendell, 267; *The People v. Morris*, 13 Wendell, 387.

Rule

Judgment on the verdict.

CHANDLER v. BOSTON. 9

1873. 112 Massachusetts, 200.¹

Annexation

COLT, J. The plaintiffs, residents and tax payers in the town of Brookline, and claiming the privileges and immunities which they are entitled to under a town government, allege by bill in equity that the act providing for the annexation of that town to the city of Boston, on certain conditions, is a violation of the provisions of the second article of the amendments of the Constitution of this Commonwealth, by which power is given to the General Court on certain conditions to charter cities. An injunction is asked to prevent proceedings by the city or town under the act, with a prayer that it may be declared void, and for general relief. To this there is a general demurrer for want of equity.

The question whether this court has jurisdiction to grant the relief asked in favor of private citizens against the contemplated alleged illegal action of these municipalities, was not argued and is not considered by us.

¹ Statement and arguments omitted. — Ed.

*Constitutional
limitation*

By the amendment of the Constitution relied on, power is given to the General Court to erect city governments in any "corporate town or towns of this Commonwealth," and to confer such powers as may be necessary for the government thereof, with the proviso that "no such government shall be erected in any town not containing twelve thousand inhabitants, nor unless it be with the consent and on the application of a majority of the inhabitants of such town present and voting thereon."

The bill alleges that the town of Brookline did not contain twelve thousand inhabitants, and that the act in question was passed by the Legislature without first obtaining the consent and without the application of a majority of the inhabitants of the town.

Rule

The court are of opinion that the demurrer is well taken. The control of the General Court over the territorial division of the State into cities, towns, and districts, unless controlled by some specific constitutional limitation, must necessarily be supreme. It is incident to that sovereign power which regulates the performance of public and political duties. The rights and franchises of such corporations are granted only to this end, and they may be modified and changed in their territorial limits as public convenience and necessity require. The inhabitants do not derive private or personal rights under the act of incorporation; they acquire no vested right in those forms of municipal government which exist under general laws in towns, as distinguished from those by which the affairs of cities are regulated. If injuriously affected by legislative action upon these political relations, within constitutional limits, the courts can afford no remedy.

*No vested
rights*

This power of the General Court it was not the intention of the amendment in question to limit or affect. It has no application to the annexation, by the authority of the Legislature, of a town or part of a town to a city already existing. It has express reference to the erection of a city government in the place of a town government within the same town limits. We are referred by the defendants to many acts of the Legislature annexing towns and parts of towns to cities, showing that this has been the uniform construction of the article in question.

Demurrer sustained.

LARAMIE COUNTY v. ALBANY COUNTY. 10

1875. 92 U. S. 307.

APPEAL from the Supreme Court of the Territory of Wyoming.

Mr. W. R. Steele, for the appellants.

Mr. A. H. Jackson, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Counties, cities, and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the State

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otherwise provides. Beyond doubt, they are, in general, made bodies politic and corporate; and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the State.

Trusts of great moment, it must be admitted, are confided to such municipalities; and, in turn, they are required to perform many important duties, as evidenced by the terms of their respective charters. Authority to effect such objects is conferred by the legislature; but it is settled law, that the legislature, in granting it, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted. Unless the Constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion. Cooley on Const., 2d ed., 192.

Sufficient appears to show that the complainant county was first organized under the act of the 3d of January, 1868, passed by the legislature of the Territory of Dacotah, which repealed the prior act to create and establish that county. When organized, the county was still a part of the Territory, and embraced within its territorial limits all the territory now comprising the counties of Laramie, Albany, and Carbon, in the Territory of Wyoming, — an area of three and one-half degrees from east to west, and four degrees from north to south. Very heavy expenses, it seems, were incurred by the county during that year and prior thereto, greatly in excess of their current means, as more fully explained in the bill of complaint, which increased the indebtedness to the sum of \$28,000. Other liabilities, it is alleged, were also incurred by the authorities of the county during that period, which augmented their indebtedness to the sum of \$40,000 in the aggregate.

Pending these embarrassments, the charge is, that the legislature of the Territory passed two acts on the same day, — to wit, Dec. 16, 1868, — creating the counties of Albany and Carbon out of the western portion of the territory of the complainant county, reducing the area of that county more than two-thirds; that, by the said acts creating said new counties, fully two-thirds of the wealth and taxable property previously existing in the old county were withdrawn from its jurisdiction, and its limits were reduced to less than one-third of its former size, without any provision being made in either of said acts that the new counties, or either of them, should assume any proportion of the debt and liabilities which had been incurred for the welfare of the whole before these acts were passed.

Payment of the outstanding debt having been made by the complainant county, the present suit was instituted in her behalf to compel the new counties to contribute their just proportion towards such indebtedness. Attempt is made to show that an equitable cause of action exists in the case by referring to the several improvements made in that part of the Territory included in the new counties before they were incorporated, and by referring to the great value of the property withdrawn from taxation in the old county, and included within the limits of the newly-created counties.

Process was served, and the respondents appeared and filed separate demurrers to the bill of complaint. Hearing was had in the District Court of the Territory, where the suit was commenced; and the court entered a decree sustaining the demurrers, and dismissing the bill of complaint. Immediate appeal was taken by the complainant to the Supreme Court of the Territory, where, the parties having been again heard, the Supreme Court entered a decree affirming the decree of the District Court, and the present appeal is prosecuted by the complainant.

Two errors are assigned, as follows: (1.) That the Supreme Court erred in affirming the decree of the District Court sustaining the demurrers of the respondents to the bill of complaint. (2.) That the Supreme Court erred in rendering judgment for the respondents.

Corporations of the kind are properly denominated public corporations, for the reason that they are but parts of the machinery employed in carrying on the affairs of the State; and it is well-settled law, that the charters under which such corporations are created may be changed, modified, or repealed, as the exigencies of the public service or the public welfare may demand. 2 Kent, Com., 12th ed., 305; Angell & Ames on Corp., 10th ed., sect. 31; *McKim v. Odom*, 3 Bland, 407; *St. Louis v. Allen*, 13 Mo. 400; *The Schools v. Tatman*, 13 Ill. 27; *Yarmouth v. Skillings*, 45 Me. 141.

Such corporations are composed of all the inhabitants of the Territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic. 1 Greenl. Ev., 12th ed., sect. 331.

Corporate rights and privileges are usually possessed by such corporations; and it is equally true that they are subject to legal obligations and duties, and that they are under the entire control of the legislature, from which all their powers are derived. Sixty-five years before the decree under review was rendered, a case was presented to the Supreme Court of Massachusetts, sitting in Maine, which involved the same principle as that which arises in the case before the court. Learned counsel were employed on both sides, and Parsons was Chief Justice of the Court, and delivered the opinion. First he adverted to the rights

and privileges, obligations and duties, of a town, and then proceeded to say, "If a part of its territory and inhabitants are separated from it by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties, unless some new provision should be made by the act authorizing the separation." *Windham v. Portland*, 4 Mass. 389.

Decisions to the same effect have been made since that time in nearly all the States of the Union where such municipal subdivisions are known, until the reported cases have become quite too numerous for citation. Nor are such citations necessary, as they are all one way, showing that the principle in this country is one of universal application. Concede its correctness, and it follows that the old town, unless the legislature otherwise provides, continues to be seized of all its lands held in a proprietary right, continues to be the sole owner of all its personal property, is entitled to all its rights of action, is bound by all its contracts, and is subject to all the duties and obligations it owed before the act was passed effecting the separation.

Suppose that is so as applied to towns: still it is suggested that the same rule ought not to be applied to counties; but it is so obvious that the suggestion is without merit, that it seems unnecessary to give it any extended examination. *County of Richland v. County of Lawrence*, 12 Ill. 8.

Public duties are required of counties as well as of towns, as a part of the machinery of the State; and, in order that they may be able to perform those duties, they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the will of the legislature as incorporated towns, as appears by the best text-writers upon the subject and the great weight of judicial authority.

Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon any thing like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with every thing of the nature of compact. Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the legislature. Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at its pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. *School Society v. School Society*, 14 Conn. 469; *Bridge Co. v. East Hartford*, 16 id. 172; *Hampshire v. Franklin*, 16 Mass. 76; *North Hemstead v. Hemstead*, 2 Wend. 109; *Montpelier v. East*

Montpelier, 29 Vt. 20; *Sill v. Corning*, 15 N. Y. 197; *People v. Draper*, id. 549; *Waring v. Mayor*, 24 Ala. 701; *Mayor v. The State*, 15 Md. 376; *Ashby v. Wellington*, 8 Pick. 524; *Baptist So. v. Candia*, 2 N. H. 20; *Denton v. Jackson*, 2 Johns. Ch. 320.

Political subdivisions of the kind are always subject to the general laws of the State; and the Supreme Court of Connecticut decided that the legislature of that State have immemorially exercised the power of dividing towns at their pleasure, and upon such division to apportion the common property and the common burdens as to them shall seem reasonable and equitable. *Granby v. Thurston*, 23 Conn. 419; *Yarmouth v. Skillings*, 45 Me. 142; *Langworthy v. Dubuque*, 16 Iowa, 273; *Justices' Opinion*, 6 Cush. 577.

Such corporations are the mere creatures of the legislative will; and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even without notice. They are but subdivisions of the State, deriving even their existence from the legislature. Their officers are nothing more than local agents of the State; and their powers may be revoked or enlarged and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated. *Russel v. Reed*, 27 Penn. St. 170.

Civil and geographical divisions of the State into counties, townships, and cities, said Thompson, C. J., had its origin in the necessities and convenience of the people; but this does not withdraw these municipal divisions from the supervision and control by the State in matters of internal government. Proof of that is found in the fact that the legislature often exercises the power to exempt property liable to taxation, and in many other instances imposes taxes on what was before exempt, or increases the antecedent burdens in that behalf. It changes county sites, and orders new roads to be opened and new bridges to be built at the expense of the counties; and no one, it is supposed, disputes the exercise of such powers by the legislature. *Burns v. Clarion County*, 62 Penn. St. 425; *People v. Pinkney*, 32 N. Y. 393; *St. Louis v. Russell*, 9 Mo. 507.

Old towns may be divided, or a new town may be formed from parts of two or more existing towns; and the legislature, if they see fit, may apportion the common property and the common burdens, even to the extent of providing that a certain portion of the property of the old town shall be transferred to the new corporation. *Bristol v. New Chester*, 3 N. H. 521.

In dividing towns, the legislature may settle the terms and conditions on which the division shall be made. It may enlarge or diminish their territorial liabilities, may extend or abridge their privileges, and may impose new liabilities. Towns, says Richardson, C. J., are public corporations, created for purposes purely public, empowered to hold property, and invested with many functions and faculties to enable them to answer the purposes of their creation.

There must, in the nature of things, be reserved, by necessary implication, in the creation of such corporations, a power to modify them in such manner as to meet the public exigencies. Alterations of the kind are often required by public convenience and necessity; and we have the authority of that learned judge for saying that it has been the constant usage, in all that section of the Union, to enlarge or curtail the power of towns, divide their territory, and make new towns, whenever the convenience of the public requires that such a change should be made.

Half a century ago, when that decision was made, the authority of the legislature to make such a division of a municipal corporation was deemed to be without doubt; and the same court decided that the power to divide the property of a municipal corporation is necessarily incident to the power to divide its territory and to create the new corporation. *Darlington v. Mayor*, 31 N. Y. 195; *Clinton v. Railroad*, 24 Iowa, 475; *Layton v. New Orleans*, 12 La. Ann. 516.

Cases doubtless arise where injustice is done by annexing part of one municipal corporation to another, or by the division of such a corporation and the creation of a new one, or by the consolidation of two or more such corporations into one of larger size. Examples illustrative of these suggestions may easily be imagined. (1.) Consolidation will work injustice where one of the corporations is largely in debt and the other owes nothing, as the residents in the non-indebted municipality must necessarily submit to increased burdens in consequence of the indebtedness of their associates. (2.) Like consequences follow where the change consists in annexing a part of one municipal corporation to another, in case the corporation to which those set off are annexed is greatly more in debt than the corporation from which they were set off.

Hardships may also be suffered by the corporation from which a portion of its inhabitants, with their estates, may be set off, in case the corporation is largely in debt, as the taxes of those who remain must necessarily be increased in proportion as the polls and estates within the municipality are diminished. Even greater injustice may arise in cases where the legislature finds it necessary to circumscribe the jurisdiction of a county or town by dividing their territory, and creating new counties or towns out of the territory withdrawn from their former boundaries.

Legislative acts of the kind operate differently under different circumstances. Instances may be given where the hardship is much the greatest towards the new municipality, as where the great body of the property and improvements are left within the new boundaries of the old corporation. Other cases are well known where the hardship is much greater towards the old corporation, as where the newly-created subdivision embraces within its boundaries all the public buildings and most of the public improvements and the most valuable lands. Circumstances of the kind, with many others not mentioned, show beyond doubt that such changes in the subdivisions of a State often present

Injustice +
hardship.

matters for adjustment involving questions of great delicacy and difficulty.

Allusion was made to this subject by the Supreme Court of New Hampshire in the case to which reference has already been made. 8 N. H. 534. Speaking of the power to divide towns, the court in that case say that the power in that regard is strictly legislative; and that the power to prescribe the rule by which a division of the property of the old town shall be divided is incident to the power to divide the territory, and is in its nature purely legislative. No general rule can be prescribed by which an equal and just decision in such cases can be made. Such a division, say the court in that case, must be founded upon the circumstances of each particular case; and in that view the court here entirely concurs. *Powers v. Commissioners of Wood County*, 8 Ohio St. 290; *Shelby County v. Railroad*, 5 Bush, 228; *Olney v. Harvey*, 50 Ill. 455.

Regulation upon the subject may be prescribed by the legislature; but, if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay, without any claim for contribution; and the new subdivision has no claim to any portion of the public property except what falls within her boundaries, and to all that the old corporation has no claim. *North Hemstead v. Hemstead*, 2 Wend. 134; *Dil. on Mun. Corp.*, sect. 128; *Wade v. Richmond*, 18 Gratt. 583; *Higginbotham v. Com.*, 25 id. 633.

Tested by these considerations, it is clear that there is no error in the record.

Decree affirmed.

JOHNSON ET AL. v. CITY OF SAN DIEGO.

1895. 109 California, 468.¹

By virtue of the act of the legislature of March 19, 1889, and of a vote at an election held thereunder, a portion of the territory formerly embraced within the corporate limits of the city of San Diego was excluded therefrom. The said act of 1889, as interpreted by the court, also provided that the segregated territory (which was known as the Coronado beach) should, after exclusion, be liable for its *pro rata* share of the indebtedness of the original municipal corporation contracted prior to such exclusion.

In 1893 (*Statutes* 1893, p. 536) the legislature passed an act pro

¹ Statement abridged from opinion. Arguments omitted. — Ed.

viding for "the adjustment, settlement, and payment of any indebtedness existing against any city or municipal corporation at the time of exclusion of territory therefrom and the division of property thereof."

Under this act, any territory which "has been or shall be" excluded from any municipal corporation shall not be subject to the payment of any indebtedness existing at the time of exclusion, if the court find that the value of the property belonging to said municipal corporation, and which remains within the boundaries thereof after such exclusion, exceeds the value of municipal property situated in such excluded territory, and also exceeds the *pro rata* portion of the indebtedness of the municipal corporation due from such excluded territory as shown by the assessment made immediately preceding such exclusion.

Plaintiffs availed themselves of the provisions of this act to have the court determine what proportion, if any, of the bonded indebtedness of San Diego was properly chargeable against the excluded territory. Under certain findings of fact, and in strict accord with the dictates of the statute, the court adjudged that there was nothing due or to become due from the excluded territory to the city.

The city of San Diego appealed from the judgment.

William H. Fuller and *Clarence L. Barber*, for appellant.

Gibson & Titus, and *Samuel M. Shortridge*, for respondent.

HENSHAW, J. [After stating the case.] The chief contention of the defendant, raised upon demurrer, pressed in its motion for a nonsuit and urged against the judgment, may be thus stated: The property owners of the city and the property owners of the excluded territory, when in accordance with the permissive act of the legislature (Stats. 1889, p. 356) they elected to segregate Coronado beach, did so under a contract expressed in the act itself, by which the property owners of the excluded territory were allowed to remove their land from the jurisdiction of the city with the understanding that they should continue to pay their *pro rata* share of the municipal debts existing at the time of the exclusion; that the rights of the city vested under this contract cannot be destroyed or impaired by subsequent legislation, and that therefore to the parties to this controversy the statute of 1893 has no applicability.

Contention

The question that is left for consideration is that of the power of the legislature to change and readjust the burden of such an indebtedness, after having in the act of separation declared in what manner it should be borne.

Municipal corporations in their public and political aspect are not only creatures of the state, but are parts of the machinery by which the state conducts its governmental affairs. Except, therefore, as restrained by the constitution, the legislature may increase or diminish the powers of such a corporation — may enlarge or restrict its territorial jurisdiction, or may destroy its corporate existence entirely. Says Cooley: "Restraints on the legislative power of control must be

found in the constitution of the state, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to right through the ballot-box all these wrongs." (Cooley on Constitutional Limitations, 6th ed., 229.)

"A city," says Mr. Justice Field, in *New Orleans v. Clark*, 95 U. S. 644, "is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged according to the requirements of the public, and which may be increased or repealed at the will of the legislature."

This right of legislative control, arising from the very nature of the creation of such corporations, is established under the well-settled doctrine that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes, or as Dillon states it: "Legislative acts respecting the political and governmental powers of municipal corporations not being in the nature of contracts, the provisions thereof may be changed at pleasure where the constitutional rights of creditors and others are not invaded." (Dillon on Municipal Corporations, 4th ed., sec. 63.)

The act of the legislature in relieving Coronado beach from the corporate control of San Diego, and in adjusting the burden of the city's debt, was undoubtedly the exercise of a proper power directed to the political and governmental affairs of the municipality. That the legislature by the terms of the act segregating the territory had the right to dispose of the common property, and provide the mode and manner of the payment of the common debt, imposing its burden in such proportions as it saw fit, is a proposition undisputed and undisputable. It is equally well-settled law that when the act of segregation is silent as to the common property and common debts, the old corporation retains all the property within its new boundaries, and is charged with the payment of all of the debts. Upon these two propositions the cases are both numerous and harmonious. (*People v. Alameda County*, 26 Cal. 641; *Hughes v. Ewing*, 93 Cal. 414; *Los Angeles County v. Orange County*, 97 Cal. 329; *Town of Depere v. Town of Bellevue*, 31 Wis. 120; 11 Am. Rep. 602; *Laramie County v. Albany County*, 92 U. S. 307; *Lycoming v. Union*, 15 Pa. St. 166; 53 Am. Dec. 575; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Layton v. New Orleans*, 12 La. Ann. 515; *Beloit v. Morgan*, 7 Wall. 619.)

There is authority, however, holding that when the legislature has spoken in the original act, rights vest under it which may not be impaired, and it is upon these cases that appellants rely.

Thus in *Bowdoinham v. Richmond*, 6 Me. 112, 19 Am. Dec. 197, the supreme court of Maine decided in 1829 that as the act of the legislature dividing the town of Bowdoinham and incorporating a part of it into a new town by the name of Richmond, enacted that the latter

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should be held to pay its proportion toward the support of all paupers then on expense in Bowdoinham, a later act exonerating the new town from this liability was void. The court held that by the former act a vested right of action arose in favor of the old town against the new, and that the later act in destroying this right impaired the obligation of the contract on the part of Richmond created by the first act. Just how the court reached the conclusion that a contract was created by the first act is not plain, but it seems to have been based somewhat upon the conviction that the assent of the old town was necessary to the segregation.

The opinion, however, looks for authority to the case of *Hampshire County v. Franklin County*, 16 Mass. 76, decided in 1819. In that case the legislature had created the county of Franklin out of territory formerly a part of the county of Hampshire. The act was silent as to the disposition of the public property and the public debt. By an act passed two years later the legislature provided in effect that if at the time of the segregation there were funds belonging to the county of Hampshire in excess of its debts, the new county should be entitled to such proportion of those funds as the assessed value of the property of the new county bore to the assessed value of the property of the old. The supreme court decided in accordance with the undoubted rule that as the first act was silent upon the subject, all of the common property within its limits belonged to the old county, which was likewise charged with all existing debts. It further held that rights vested under this act, and that the later act providing for an apportionment violated these rights in attempting to give the property of Hampshire to Franklin county; in other words, that the later act created a debt from Hampshire to Franklin county, which before had not existed.

It is to be noticed that in this case the original act was silent as to common property and debts, but as in such case the law steps in and makes disposition of them, the silence was deemed equivalent to an affirmative declaration of the legislature making disposition which could not afterward be modified.

But distinguished as are the courts which have announced this doctrine, their views have not been followed, and the decisions themselves have been elsewhere criticised and rejected, until it may be safely said that it is the general rule that where the original act does not make disposition of the common property and debts the legislature may at any subsequent time by later act apportion them in such manner as seems to be just and equitable.

Under the decisions adopting this rule the theory of vested rights and contractual relations is rejected as being a false quantity in the dealings of the sovereign state with its governmental agents and mandatories. And while it is not denied that the state may make a contract with a municipal corporation, or may permit municipal corporations to enter into binding contracts with each other, which contracts

It cannot impair, these contracts must be in their nature private, although the public may derive a common benefit from them, and the contracting cities are as to them measured by the same rules and entitled to the same protection as would a private corporation. The subject of such a contract, however, can never be a matter of municipal polity or of civil or political power, for the legislature itself cannot surrender its supremacy as to these things and thus abandon its prerogatives and strip itself of its inherent and inalienable right of control.

Of the cases so holding, either directly or impliedly, a few may profitably be mentioned. [The court here referred to *County of Richland v. County of Lawrence*, 12 Ill. 1; *Perry County v. Conaway County*, 52 Ark. 430; *Dunmore's Appeal*, 52 Pa. State, 430; *Layton v. New Orleans*, 12 La. Ann. 515; and *Mayor of Baltimore v. State*, 15 Maryland, 376.]

Says Dillon on Municipal Corporations, fourth edition, section 189: "But upon the division of the old corporation, and the creation of a new corporation out of a part of its inhabitants and territory, or upon the annexation of part of another corporation, the legislature may provide for an equitable apportionment or division of the property and impose upon the new corporation, or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts. The charters and constituent acts of public and municipal corporations are not, as we have before seen, contracts, and they may be changed at the pleasure of the legislature, subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such corporations to provide for their enlargement or division, and, incidental to this, to apportion their property and direct the manner in which their debts or liabilities shall be met and by whom. The opinion has been expressed that the partition of the property must be made at the time of the division or change in the corporation, since otherwise the old corporation becomes, under the rule just above stated, the sole owner of the property, and hence cannot be deprived of it by a subsequent act of the legislature. But, in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps, be maintained, as it is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporate bodies, divisions, and parts, and with several well-considered adjudications."

To the same general effect are the cases of *Laramie County v. Albany County*, *supra*; *Mount Pleasant v. Beckwith*, *supra*; *Scituate v. Weymouth*, 108 Mass. 128; *Willimantic School Society v. First School Society*, 14 Conn. 457; *Guilford v. Supervisors*, 13 N. Y. 143.

In this state the power of the legislature to make such subsequent adjustments was early declared in *People v. Alameda County*, *supra*. Alameda county was created out of the territory of Contra Costa county in 1853. At the time of the separation Contra Costa county

owed for a bridge which had been constructed upon the territory set apart to Alameda county. The original act made no provision for the payment of this indebtedness, which thus remained a charge against the old county. By two separate later acts the legislature provided for the apportionment of the debt, putting a part of the burden upon Alameda county. These acts were upheld as a proper exercise of legislative power.

And, indeed, it is not easy to see how the opposite view can be maintained. Since the legislative power, within constitutional limitations, is supreme in the matter; since, in the first apportionment the people affected are entitled to no voice (except through their representatives), and since the act of the legislature is not in the nature of a contract, it cannot logically be held that the power has been exhausted by its first exercise. The right still remains to make such future adjustments as the equities may suggest.

Nor in the operation of the act in question upon the city of San Diego can we perceive any hardship. It had at the time of the segregation six hundred thousand dollars, acquired while Coronado beach was a part of its territory, and partially acquired, doubtless, by taxation upon this land. All of this property it retains. All of the moneys evidenced by the bonded indebtedness were expended within its present territorial limits, and no dollar of it went to improve the excluded territory. Having all of the common property and all of the fruits of the common debt, it is certainly not onerous or oppressive that it should be asked to pay for what has been expended for its exclusive benefit. In a certain sense, it is true that Coronado beach was also benefited by these expenditures. In the same sense San Mateo county is benefited by the public improvements of the city and county of San Francisco, but it has never been asserted that for such benefits a sister county should be called upon to pay.

The judgment and order appealed from are affirmed.

HARRISON, J., TEMPLE, J., VAN FLEET, J., GAROUTTE, J., and BEATTY, C. J., concurred.

BLOOMFIELD v. GLEN RIDGE. 12

1896. 54 *New Jersey Equity*, 276.¹

BILL in equity, by Inhabitants of the Township of Bloomfield against the Mayor and Council of the Borough of Glen Ridge; praying for an injunction, restraining defendants from interfering with the complainant's sewers within the limits of the borough and from exercising any management over such sewers. The allegations of the bill are sufficiently stated in the opinion.

Defendants demurred.

¹ Statement abridged.—Ed.

Division
Prop.

George S. Hilton, for complainant.

Joseph G. Gallagher and *Joseph Coult*, for defendants.

REED, V. C. It appears that the township of Bloomfield, together with the city of Orange and the township of Montclair, built an outlet sewer, each to pay its proportion of the expenses; that Bloomfield has raised its proportion by issuing bonds, which are still outstanding. It appears that the township of Bloomfield also constructed lateral sewers through its streets and paid for them \$30,863.97.

It appears that since the construction of these sewers, a new borough has been organized, called the borough of Glen Ridge. It also appears that a portion of the territory of the township of Bloomfield has been included within the limits of the new borough, and that a number of streets in which these lateral sewers were placed, are now within the territorial limits of the borough. The question which the bill attempts to raise is, whether the right to control the use of such sewers as now lie within the borough, has passed to the borough government, or whether it still resides in the township authority.

The contention on the part of the township is, that it paid for these laterals, and is liable to pay for its part of the cost of the main sewer, by means of which the laterals became usable; that the title in the laterals still resides in it, and that it has the right to control and use its own property.

It is stated in the bill, for the purpose of adding to the force of this contention, that these sewers were built to be operated as a single system, and that it has, under a contract with the township of Montclair, become liable to pay a proportionate share of the expense of building and maintaining the sewer through the territory of Glen Ridge. I do not perceive that these facts can influence the decision of the question in hand. The sewers must be regarded as any other corporate property for which the municipality has paid, or for which it is liable to pay, either by reason of its outstanding bonds or by the terms of a contract still outstanding. It is corporate property, and the query is, to whom does the right to use and control it belong after it is thrown into the new municipality? Many of the questions which spring out of the divisions of the territory of a municipality in respect to the property of the old municipality are entirely settled. For instance, it is settled that the legislature, by virtue of its control over municipal corporations, has the ability to fix the rights of the new and the old corporations in the property, and to adjust the burden of the corporate debts. *Dill. Mun. Corp.* § 127.

It is also settled that where no legislative adjustment is provided for, then the old corporation remains liable for all the debts. *Dill. Mun. Corp.* § 128. It is also settled that all transitory property, such as bonds, money in sinking funds and property of that class, and all real estate that lies within the limits of the old corporation, remains the property of the old municipality.

But in respect to property used for public purposes, such as engine-

houses, school-houses, public markets, which are located upon lands which fall within the limits of the new corporation, there exists some contrariety of judicial sentiment. There are cases which hold that the old corporation is not stripped of its title to such property. In *Whittier v. Sandborn*, 38 Me. 32, it was held that the alterations of the lines of the school district, whereby a school-house was left in another district, would not change the right of property therein. It was also said, *obiter*, in *School District v. Richardson*, 23 Pick. 62, that the alteration of the lines of a school district would not change the property rights of the old district in a school-house thrown outside of its limits.

In *Board of Health of Buena Vista Township v. City of East Saginaw*, 45 Mich. 257, land had been conveyed to the board of health in trust for cemetery purposes for the township of Buena Vista. Afterwards, the city of East Saginaw was incorporated, including the cemetery. The court held that there was no common-law rule by which property can be transferred from one corporation to another without a grant, and as there was no statute, the property was unaffected by the change of corporate lines.

? Nec. of grant

In *Winona v. School District No. 82*, 40 Minn. 13, a school-house, by the alteration of the city lines, had been thrown within the city limits; it was held that the old district still retained title to the school-house. The opinion of this case reviews, exhaustively, the cases which have dealt with the subject. These cases, as is perceived, involve the question of title to school-houses, cemeteries, and ministers' houses, which, by reason of the manner in which, and the purpose for which, they are usable, may possibly be distinguishable from other kinds of municipal property lying within the new territory. But the reasoning upon which some of the cases go, viz., that there is no other way by which the old corporation can be deprived of its title except through its own grant or by express legislation, seems to include, within the rule announced, property of all kinds.

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Opposed to the theory of these cases, there are *dicta* of great weight in favor of an opposite rule as the better one, viz., that property fixed to the land within the new corporation becomes the property of that municipality. The cases in which this doctrine has been asserted or approved are the following: *Bridge Company v. East Hartford*, 16 Conn. 171; *School District v. Tapley*, 1 Allen, 48; *Laramie County v. Albany County*, 92 U. S. 315; *Mount Pleasant v. Beckwith*, 100 U. S. 525; *Board v. Board*, 30 W. Va. 424; *North Hemstead v. Hemstead*, 2 Wend. 109.

Rule

In my judgment, the cases which hold that the right to control this kind of property remains still in the old corporation, press unduly the notion that there must be an express grant or express legislation to pass control over such property to the new municipality. The title held by a municipality is of a peculiar kind. It is held by the corporation as a trustee for the public. Municipal corporations are

organized for the purpose of creating agencies for the purchase, construction, and operation of such appliances as are essential to the health, safety, and convenience of the people and their property. The appliances so created, whether engine-house, market-house, school-house, lamps, water-pipes, hydrants, sewers, are so distributed as to be of the most efficient service to the public; they are brought into existence to be so used. Now, when the territorial limits of a corporation are diminished by the excision of a part of its territory, the power of control of the public agent over those appliances is restricted to the newly-defined limits of the corporation. This is admittedly so, unless the legislature does what is unusual, confers a power upon its agents to act extra-territorially. It is entirely settled that the powers of city officers are extended or restricted in conformity with the change of the boundaries of a municipality. *Ehrgott v. Mayor of New York*, 96 N. Y. 264; *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Town of Toledo v. Edens*, 59 Iowa, 352; *Coldwater v. Tucker*, 36 Mich. 474; *Strauss v. Pontiac*, 40 Ill. 301.

It follows, therefore, that the power to use the property lying outside of the boundaries of the old corporation for municipal purposes is extinct. It is admitted in the case of *Winona v. School District No. 82*, *supra*, that the old corporation held only the bare title to the school-house which by change of line was thrown into the city. The old corporation could only sell it as it stood. It could not use it for the purpose to which it had been built and devoted.

Now, as a matter of public policy, it is important that this kind of property shall be continuously employed in subserving the public purpose for which it was created. The only agency existing which can so use it, is that which has sprung into existence by the organization or creation of the new corporation. Now, it seems to me quite as reasonable to say that the legislature, by conferring the power to create the new corporation, implicitly conferred a power to employ all public property found within its limits, as it is to say that it meant that this property should lie idle. And if it be said that the new corporation may purchase it, it is answered, who is to fix the price? and, while negotiations are pending, who is to control and use this public property?

Now, the legislature undoubtedly, if its attention was called to this matter, would fix upon some method, judicial or otherwise, by which the distribution of municipal property and municipal debts could be adjusted in all instances like the one under consideration.

But, in the absence of such legislation, I think that the doctrine which I have announced is the most conducive to the public interest. Nor is it, as a rule, more inequitable than the other. When the property which falls within the new corporation is still to be paid for, it is, of course, inequitable that the whole burden of payment should fall upon the old corporation. But it is quite likely that such property, as I understand is the case in respect to the lateral sewers, has been

already paid for. In such case, the people in the new government have paid their proportion of the expenses, and where the property is of a kind to be distributed through the territorial limits of the old corporation, like lamp-posts, hydrants, water-pipes, and sewers, it is quite probable that the new corporation gets no more by the alteration of municipal lines than its inhabitants have paid for.

Upon the assumption, therefore, that the borough and the township are distinct corporations, I am of the opinion that the complainants have exhibited no ground for the relief they claim.

The complainants, however, insist that the parties to this suit do not stand on the footing of distinct municipalities.

The contention is that the borough, organized within the township limits, does not exclude the control of the township over all the objects of local government; that, like the city of Plainfield and the village of Flemington and certain commissions, only a portion of the local government is confided to it, while the residue remains in the larger municipality.

Now, it is undoubtedly true that the boroughs, as originally formed under the act of 1878, did not possess local powers co-extensive with those of townships. Many of the objects of local government still remained in the township; but as, by supplements to the acts of 1878, the powers of the borough government were enlarged from time to time, so, *pari passu*, those of the townships were diminished, and the township governments were necessarily excluded from any control over the subjects which were thus confided to the borough government.

This consequence necessarily results from the well-settled doctrine, that there cannot be two municipal corporations for the same purposes, with co-extensive powers of government, at the same time, over the same territory. *Grant. Corp.* 18; *Dill. Mun. Corp.* (3d ed.) § 184; *Paterson v. Society*, 4 Zab. 385; *King v. Passmore*, 3 T. R. 343.

Now, among the subjects which have been confided to the borough government under supplements to the general act, is that of control over sewers. *P. L. of 1893*, pp. 271, 460; *P. L. of 1892*, pp. 96, 397.

The effect of investing boroughs with this control is to exclude the control of any other municipal corporation within the limits of the borough.

It is, therefore, apparent that the discussion with respect to the constitutionality of the act of 1895, which act purported to sever the territory of the boroughs organized under the act of 1878 from the territory of the township, is unimportant, for, unless all the supplements which have conferred powers upon the boroughs are unconstitutional, the act conferring control over sewers must be regarded as valid, and it, without further legislation, excludes the township from exercising any control, in respect to this branch of municipal government, within the limits of the borough.

I therefore regard the two municipalities, in respect to the matter now under consideration, as entirely distinct. This view strips the complainants, as already remarked, of the right to relief under this bill.

*Annexation
Prop.*

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF
INDIANAPOLIS v. CENTER TOWNSHIP AND CENTER
SCHOOL TOWNSHIP.

13

1896. 143 Indiana, 391.¹

Suit to recover possession and quiet the title in plaintiff of several parcels of real estate, and to compel the trustee of the township to convey the same to plaintiff. The parcels in question were tracts upon which school-houses had been erected for the use of the schools of Center township; and which afterwards, by an ordinance of annexation, had become embraced within the limits of the city. //

Center School township claimed that, because said township was in debt for a part of the cost of such land and school-houses, the plaintiffs ought to pay a part of that indebtedness proportioned to the amount of taxable property withdrawn from the school township by the annexation. The decree, in substance, was that the trustee of the school township should convey the real estate to plaintiff, upon the payment by plaintiff to him of \$4,821.48; and that plaintiff pay to the school township the said sum of \$4,821.48.

Plaintiff appealed.

C. A. Dryer, for appellant.

Ayres & Jones, for appellees.

McCabe, J. . . . The demurrer to the different paragraphs of the cross-complaint, therefore, presents the question whether the annexation of territory to a city, which territory contains a school-house and lot belonging to the school township from which the territory is taken, affords a cause of action in favor of such school township against the school corporation of such city, either for the value of such property, or for a part of any unpaid indebtedness of such school township, incurred in either the purchase of the lot or the erection of the house.

If there can be a recovery by the school township for any part of the unpaid indebtedness on account of the cost of such school building in the absence of statutory authority, then no reason is perceived why there could not be a recovery against the city school corporation for the full value of the property regardless of any indebtedness.

The question is not a new one in this court, though there is not perfect harmony in its decisions thereon.

The whole argument of the learned counsel for appellees in support

¹ Statement abridged. Part of opinion omitted. — Ed.

of the ruling upholding the cross-complaint is based on the idea that it would be highly inequitable to allow the city school corporation to get the benefit of the taxes collected and to be collected, to defray the expense of purchasing the lots, and building the school-houses without contribution, and that the courts have power to adjust such equities by decreeing contribution against the city school corporation. But the difficulty in the way of that argument is that contribution may result in forcing the taxpayers residing in the annexed territory to pay twice, or to pay their proportion of the tax a second time.

argument

Here the Legislature has made provision that the title to school property embraced in annexed territory shall vest in and be conveyed to the school corporation of the annexing city, without making any provision for payment of any part of the value of such school-houses or any part of any indebtedness of the school township created on account thereof and remaining unpaid.

Legis. has acted

But it is insisted that in so far as the statute is retrospective it is void as to vested rights. The act is expressly retrospective, and therefore applies to the annexation involved in this case. Retrospective laws may be passed by the Legislature when they do not destroy or interfere with vested rights. *Andrews v. Russell*, 7 Blackf. 474; *Reed v. Coale, Admr.*, 4 Ind. 283; *Pritchard v. Spencer*, 2 Ind. 486; *Flinn v. Parsons, Admr.*, 60 Ind. 573; *Johnson v. Board, etc.*, 107 Ind. 15; *Dowell v. Talbot Paving Co.*, 138 Ind. 675.

act retrospective

The act did not interfere with vested rights, because the school township only held the title as we have seen as trustee, and the State has the right, as it did in this act, to change the trustee. Indeed, the act does nothing more than re-enact what this court had already declared the law to be in the cases we have cited in this opinion upon that point.

The question presented by the cross-complaint is the same precisely as if the trustee of Center township had promptly conveyed the school-houses and lots in question to the city school corporation, in obedience to the above mentioned act, and then sued the city school corporation for contribution as he has in the cross-complaint. The problem would be, as it now is, solved by recurring to the elementary principle that no person or corporation can be made liable to pay money outside of a tort, without a contract, express or implied, to that effect, unless such liability is created by positive law or legislative enactment. 13 Am. and Eng. Ency. of Law, 287, and authorities there cited.

There is no room for, and there is no contention that the facts establish such a contract, either express or implied, on the part of the city school corporation. Such city school corporation had nothing to do, and could have nothing to do, in bringing the annexed territory into the city, even if that would create an implied obligation to contribute. Moreover, its objections and protest against the annexation, if it had any, would have been impotent and powerless to prevent the same.

R. S. 1894, sections 3808-3809. Acts 1891, p. 137, sections 37-38. Therefore, if the city school corporation in this case is to be made liable to contribute, that liability must be created by the decree of the court, as was attempted to be done in this case. The creation of such liability being the exercise of a legislative function or power which the constitution forbids the courts to exercise, the superior court erred in attempting to do so. Section 1, article 3, Const., R. S. 1894, section 96. It follows from what we have said that the special term erred in overruling the demurrer to the several paragraphs of the cross-complaint, and consequently the general term erred in affirming that part of the judgment resting on the cross-complaint, namely, the judgment against the appellant for \$4,821.48.

That part of the judgment is reversed, and the judgment in favor of the appellant, the city school corporation, for the conveyance to it of the school-houses and lots is affirmed, freed from the condition to pay said sum.

The cause is remanded, with instructions to sustain the demurrer to the several paragraphs of the so-called answer, but which is a cross-complaint or counterclaim.

PEOPLE EX REL. SCHEUBER v. NIBBE. 14

1894. 150 Ill. 269.

*appealing
H. Co*

BAILEY, J. This was a proceeding by quo warranto, brought to test the validity of the organization of Drainage District No. one, in the township of Niles, Cook county, claimed to have been organized under the provisions of the Farm Drainage Act. It seems to be conceded that, in the organization of the district, all the statutory requirements were complied with, the only objection to its validity being, that the district includes a portion of the territory of the village of Niles Center, a municipal corporation organized under the general law in relation to the incorporation of cities and villages.

*Terr. must be
contiguous*

It appears that the district embraces a long, narrow and somewhat irregularly shaped territory, and that at about the middle of the district, a portion of the territory of the village is included, extending entirely across the district. It will thus be seen that, if the portion of the village included in the district were omitted therefrom, the district would be divided into two separate portions, having no connection with each other, and it may perhaps be admitted that if the village territory was improperly and illegally included, the organization of the district must be held to be invalid.

Rule

But we are unable to see upon what ground it can be held that the inclusion in a drainage district organized under the Farm Drainage Law of a portion of the territory of a village already organized under the general law in relation to cities and villages is improper or un-

lawful. It cannot be doubted that the Legislature has the power to authorize the organization of municipal corporations for one purpose, embracing territory situated wholly or partly within the boundaries of another municipal corporation already organized for another purpose.

This question was fully considered in *Wilson v. Board of Trustees*, 133 Ill. 443. That case involved the question of the constitutionality of the act entitled, "An Act to create sanitary districts, and to remove obstructions in the Des Plaines and Illinois rivers," approved May 29, 1889, the first section of which provided that, "whenever any area of contiguous territory within the limits of a single county shall contain two or more incorporated cities, towns or villages, and shall be so situated that the maintenance of a common outlet for the drainage thereof will conduce to the preservation of the public health, the same may be incorporated as a sanitary district." One of the questions raised was, whether it was within the power of the General Assembly, under the Constitution, to authorize the formation of sanitary districts, disregarding the existence and boundaries of pre-existing municipal corporations, and invest the corporate authorities with the power of taxation for sanitary purposes. In considering that question, we held, that while the General Assembly may vest in cities, towns and villages, the power to construct sewers, drains, etc., for sanitary purposes, it may also create a corporation within the county, and invest it with like power, and so, may create a corporation including both city and county, and invest it with power to secure the public health by means of sewers, channels and drains; that there are no constitutional restrictions as to the boundary lines of public or municipal corporations within which new corporations may be formed, except as to counties, and that it is wholly unnecessary that the corporate authorities of the new corporation should be also the corporate authorities of some specific pre-existing corporation; that it therefore violates no principal of constitutional law to create a district, and vest it with powers of taxation for sanitary purposes, co-extensive with the territory to be controlled, and that the propriety of the creation of such municipal corporation belongs alone to the General Assembly and not to the courts.

Precisely the same doctrine must be held to apply to the statute under which the drainage district now before us was organized. That was an act "to provide for drainage for agricultural and sanitary purposes," etc., and, upon the same principles laid down in the case above cited, the General Assembly had power, under the constitution, to provide for the organization of drainage districts, embracing such territory as in the exercise of its legislative discretion it thought proper, wholly irrespective of whether the territory to be thus organized into a drainage district, or any part of it, was already embraced within the boundaries of a pre-existing municipal corporation.

We are also of the opinion that the provisions of the Farm Drainage Act cannot be so interpreted as to exclude from a drainage district to

be organized under them, the territory already embraced within the limits of an incorporated village. Section eleven of the act and subsequent sections which provide for the formation of districts for combined drainage out of territory lying within a single town, merely provides that the territory to be embraced within the proposed district shall lie within one town. 3 Starr & Cur. Stat. 443, *et seq.* The provisions of these sections are sufficiently broad to embrace any and all contiguous territory within a town which is so circumstanced as to require a combined system of drainage for agricultural or sanitary purposes wholly irrespective of whether any portion of it is already included within the boundaries of a pre-existing municipal corporation or not. And we know of no other provision of the statute, and are referred to none, by which any further limitation in this respect is imposed.

By the judgment of the Circuit Court, the petition for a writ of *quo warranto* was dismissed, and we are of the opinion that, upon the facts appearing in the record that judgment was proper, and it will therefore be affirmed.

Judgment affirmed.

HUNTER v. PITTSBURGH.

1907. 207 U. S. 161.

Moody J.¹ The plaintiffs in error seek a reversal of the judgment of the Supreme Court of Pennsylvania, which affirmed a decree of a lower court, directing the consolidation of the cities of Pittsburgh and Allegheny. This decree was entered by authority of an act of the General Assembly of that State, after proceedings taken in conformity with its requirements. The act authorized the consolidation of two cities, situated with reference to each other as Pittsburgh and Allegheny are, if upon an election the majority of the votes cast in the territory comprised within the limits of both cities favor the consolidation, even though, as happened in this instance, a majority of the votes cast in one of the cities oppose it. The procedure prescribed by the act is that after a petition filed by one of the cities in the Court of Quarter Sessions, and a hearing upon that petition, that court, if the petition and proceedings are found to be regular and in conformity with the act, shall order an election. If the election shows a majority of the votes cast to be in favor of the consolidation, the court "shall enter a decree annexing and consolidating the lesser city . . . with the greater city." The act provides, in considerable detail, for the effect of the consolidation upon the debts, obligations, claims and property of the constituent cities; grants rights of citizenship to the citizens of those cities in the consolidated city; enacts that "except

¹ Statement and arguments omitted. — Ed.

as herein otherwise provided, all the property . . . and rights and privileges . . . vested in or belonging to either of said cities . . . prior to or at the time of the annexation, shall be vested in and owned by the consolidated or united city," and establishes the form of government of the new city. This procedure was followed by the filing of a petition by the City of Pittsburgh; by an election in which the majority of all the votes cast were in the affirmative, although the majority of all the votes cast by the voters of Allegheny were in the negative, and by a decree of the court uniting the two cities.

Prior to the hearing upon the petition the plaintiffs in error, who were citizens, voters, owners of property and tax-payers in Allegheny, filed twenty-two exceptions to the petition. These exceptions were disposed of adversely to the exceptants by the Court of Quarter Sessions, and the action of that court was successively affirmed by the Superior and Supreme courts of the State. The case is here upon writ of error, and the assignment of errors alleges that eight errors were committed by the Supreme Court of the State. This assignment of errors is founded upon the dispositions by the state courts of the questions duly raised by the filing of the exceptions under the provisions of the Act of the Assembly.

The defendants in error moved to dismiss the case because no Federal question was raised in the court below or by the assignments of error, or, if any Federal question was raised, because it was frivolous. This motion must be overruled. The plaintiffs in error claimed that the Act of Assembly was in violation of the Constitution of the United States, and specially set up and claimed in the court below rights under several sections of that Constitution, and all their claims were denied by that court. These rights were claimed in the clearest possible words, and the sections of the Constitution relied upon were specifically named. The questions raised by the denial of these claims are not so unsubstantial and devoid of all color of merit that we are warranted in dismissing the case without consideration of their merits.

Some part of the assignments of error and of the arguments in support of them may be quickly disposed of by the application of well-settled principles. We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the constitution of the State and the conformity of the enactment of the Assembly to that constitution; those questions are for the consideration of the courts of the State, and their decision of them is final. The Fifth Amendment to the Constitution of the United States is not restrictive of state, but only of national, action.

After thus eliminating all questions with which we have no lawful concern, there remain two questions which are within our jurisdiction. There were two claims of rights under the Constitution of the United

States which were clearly made in the court below and as clearly denied. They appear in the second and fourth assignments of error. Briefly stated, the assertion in the second assignment of error is that the Act of Assembly impairs the obligation of a contract existing between the City of Allegheny and the plaintiffs in error, that the latter are to be taxed only for the governmental purposes of that city, and that the legislative attempt to subject them to the taxes of the enlarged city violates Article I, section 9, paragraph 10, of the Constitution of the United States. This assignment does not rest upon the theory that the charter of the city is a contract with the State, a proposition frequently denied by this and other courts. It rests upon the novel proposition that there is a contract between the citizens and tax-payers of a municipal corporation and the corporation itself, that the citizens and tax-payers shall be taxed only for the uses of that corporation, and shall not be taxed for the uses of any like corporation with which it may be consolidated. It is not said that the City of Allegheny expressly made any such extraordinary contract, but only that the contract arises out of the relation of the parties to each other. It is difficult to deal with a proposition of this kind except by saying that it is not true. No authority or reason in support of it has been offered to us, and it is utterly inconsistent with the nature of municipal corporations, the purposes for which they are created, and the relation they bear to those who dwell and own property within their limits. This assignment of error is overruled.

Briefly stated, the assertion in the fourth assignment of error is that the Act of Assembly deprives the plaintiffs in error of their property without due process of law, by subjecting it to the burden of the additional taxation which would result from the consolidation. The manner in which the right of due process of law has been violated, as set forth in the first assignment of error and insisted upon in argument, is that the method of voting on the consolidation prescribed in the act has permitted the voters of the larger city to overpower the voters of the smaller city, and compel the union without their consent and against their protest. The precise question thus presented has not been determined by this court. It is important, and, as we have said, not so devoid of merit as to be denied consideration, although its solution by principles long settled and constantly acted upon is not difficult. This court has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties, and the rights of their citizens and creditors. *Maryland v. Balt. & Ohio Railroad*, 3 How. 534, 550; *East Hartford v. Hartford Bridge Company*, 10 How. 511, 533, 534, 536; *United States v. Railroad Company*, 17 Wall. 322, 329; *Laramie County v. Albany County*, 92 U. S. 307, 308, 310-312; *Commissioners v. Lucas*, 93 U. S. 108, 114; *New Orleans v. Clark*, 95 U. S. 644, 654; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 524, 525, 531, 532; *Meriwether v. Garrett*, 102 U. S. 472, 511; *Kelly v. Pittsburgh*, 104 U. S. 78, 80; *Forsyth v. Hammond*.

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166 U. S. 506, 518; *Williams v. Eggleston*, 170 U. S. 304, 310; *Covington v. Kentucky*, 173 U. S. 231, 241; *Worcester v. Worcester Street Railway Company*, 196 U. S. 539, 549; *Kies v. Lowrey*, 199 U. S. 233. It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

Applying these principles to the case at bar, it follows irresistibly that this assignment of error, so far as it relates to the citizens who are plaintiffs in error, must be overruled.

It will be observed that in describing the absolute power of the State over the property of municipal corporations we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and

that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts (1 Dillon, Municipal Corporations, 4th ed., sections 66 to 66a, inclusive, and cases cited in note to 48 L. R. A. 465), and it has been held that as to the latter class of property the Legislature is not omnipotent. If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon says truly that the question has never arisen directly for adjudication in this court. But it and the distinction upon which it is based has several times been noticed. *Commissioners v. Lucas*, 93 U. S. 108, 115; *Meriwether v. Garrett*, 102 U. S. 472, 518, 530; *Essex Board v. Skinkle*, 140 U. S. 334, 342; *New Orleans v. Water Works Co.*, 142 U. S. 79, 91; *Covington v. Kentucky*, 173 U. S. 231, 240; *Worcester v. Street Railway Co.*, 196 U. S. 539, 551; *Monterey v. Jacks*, 203 U. S. 860. Counsel for plaintiffs in error assert that the City of Allegheny was the owner of property held in its private and proprietary capacity, and insist that the effect of the proceedings under this act was to take its property without compensation and vest it in another corporation, and that thereby the city was deprived of its property without due process of law in violation of the Fourteenth Amendment. But no such question is presented by the record, and there is but a vague suggestion of facts upon which it might have been founded. In the sixth exception there is a recital of facts with a purpose of showing how the taxes of the citizens of Allegheny would be increased by annexation to Pittsburgh. In that connection it is alleged that while Pittsburgh intends to spend large sums of money in the purchase of the water plant of a private company and for the construction of an electric light plant, Allegheny "has improved its streets, established its own system of electric lighting, and established a satisfactory water supply." This is the only reference in the record to the property rights of Allegheny, and it falls far short of a statement that that city holds any property in its private and proprietary capacity. Nor was there any allegation that Allegheny had been deprived of its property without due process of law. The only allegation of this kind is that the tax-payers, plaintiffs in error, were deprived of their property without due process of law because of the increased taxation which would result from the annexation — an entirely different proposition. Nor is the situation varied by the fact that, in the Superior Court, Allegheny was "permitted to intervene and become one of the appellants." The city made no new allegations and raised no new questions, but was content to rest upon the record as it was made up. Moreover, no question of the effect of the act upon private property rights of the City of Allegheny was considered in the opinions in the state courts or suggested by assignment of errors in this court. The question is entirely outside of the record and has no connection with

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any question which is raised in the record. For these reasons we are without jurisdiction to consider it, *Dewey v. Des Moines*, 178 U. S. 198; *Harding v. Illinois*, 196 U. S. 78, and neither express nor intimate any opinion upon it.

The judgment is

Affirmed.

MOUNT PLEASANT v. BECKWITH.

1879. 100 U. S. 514.¹

APPEAL from U. S. Circuit Court for Eastern District of Wisconsin.

Bill in equity by Beckwith against the town of Mount Pleasant, the town of Caledonia, and the city of Racine to enforce the payment of certain bonds.

In 1853 the town of Racine and each of the three above-named municipalities were distinct municipal corporations established by law. The bonds in suit were issued by the town of Racine, under authority of the legislature. In 1859 the name of the town of Racine was changed to Orwell. In 1860 the legislature passed an act vacating and extinguishing the town of Orwell (formerly the town of Racine), and enacting that thereafter it should have no existence as a body politic and corporate. This act of 1860 annexes part of the territory of Orwell to Caledonia, and the remainder to Mount Pleasant; but contains no provision relative to the payment of the existing indebtedness of Orwell. In 1871 an act was passed taking from Mount Pleasant a portion of the territory which had been thus annexed to it in 1860, and adding such territory to the city of Racine. This act of 1871 provides that the city of Racine "shall assume and pay so much of the indebtedness of the town of Racine as the lands described in the first section of the act may be or become legally chargeable with and liable to pay."

The court, upon the aforesaid facts and upon the report of a master stating the respective proportions and valuations of the taxable property received by each of the defendant municipalities from the town of Orwell, made a decree that the defendants should severally pay certain proportions of the debt due Beckwith. The decree was based on the theory that an equitable liability for the indebtedness of the town of Racine, *alias* Orwell, accrued against the defendant municipalities, to which such territory was distributed, in the proportion which the taxable property received by each and the valuation thereof bore to the whole taxable property and the whole debt of such vacated town.

¹ Statement abridged. Argument and part of opinion omitted. — Ed.

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From this decree the town of Mount Pleasant and the town of Caledonia appealed.

L. S. Dixon and John T. Fish, for appellants.

Wm. P. Lynde, contra.

CLIFFORD, J. [After recapitulating the facts, and stating the power of the legislature over municipal corporations, and noting the fact that the city of Racine did not appeal from the decree below.] . . . The only question open in the case for examination is whether the other two respondent municipal corporations are liable to any extent for the debts of the extinguished municipality, portions of whose territory were transferred by the legislature into their respective jurisdictions. We say, liable to any extent, because the question of amount was submitted to the master, and the record shows that neither of the appellants excepted to the master's report. *Gordon v. Lewis*, 2 Sum. 143; *McMicken v. Perin*, 18 How. 507. Nor do either of the assignments of error allege that the master committed any error in that regard. *Brockett v. Brockett*, 3 id. 691.

Viewed in that light, as the case should be, it is clear that if the appellants are liable at all they are liable for the respective amounts specified in the decree. *Harding v. Handy*, 11 Wheat. 103; *Story v. Livingston*, 13 Pet. 359.

Where one town is by a legislative act merged in two others, it would doubtless be competent for the legislature to regulate the rights, duties, and obligations of the two towns whose limits are thus enlarged; but if that is not done, that it must follow that the two towns succeed to all the public property and immunities of the extinguished municipality. *Morgan v. Beloit, City and Town*, 7 Wall. 613, 617.

It is not the case where the legislature creates a new town out of a part of the territory of an old one, without making provision for the payment of the debts antecedently contracted, as in that case it is settled law that the old corporation retains all the public property not included within the limits of the new municipality, and is liable for all the debts contracted by her before the act of separation was passed. *Town of Depere and Others v. Town of Bellevue and Others*, 31 Wis. 120, 125.

Instead of that, it is the case where the charter of one corporation is vacated and rendered null, the whole of its territory being annexed to two others. In such a case, if no legislative arrangements are made, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one that ceases to exist, and that they will become liable for all the legal debts contracted by her prior to the time when the annexation is carried into operation.

Speaking to the same point, the Supreme Court of Missouri held that where one corporation goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the sub-

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sisting corporation will be entitled to all the property and be answerable for all the liabilities. *Thompson v. Abbott*, 61 Mo. 176, 177.

Grant that, and it follows that when the corporation first named ceases to exist there is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness. Its property passes into the hands of its successor, and when the benefits are taken the burdens are assumed, the rule being that the successor who takes the benefits must take the same *cum onere*, and that the successor town is thereby estopped to deny that she is liable to respond for the attendant burdens. *Swain v. Seamens*, 9 Wall. 254, 274; *Pickard v. Sears*, 6 Ad. & Ell. 474.

Powers of a defined character are usually granted to a municipal corporation, but that does not prevent the legislature from exercising unlimited control over their charters. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion, and substitute in their place those which are different. Cooley, Const. Lim. (4th ed.) 232.

Municipal corporations, says Mr. Justice Field, so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the State for the convenient administration of their affairs; but when authorized to take stock in a railroad company, and issue their obligations in payment of the stock, they are to that extent to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. *Broughton v. Pensacola*, 93 U. S. 266, 269.

Modifications of their boundaries may be made, or their names may be changed, or one may be merged in another, or it may be divided and the moieties of their territory may be annexed to others; but in all these cases, if the extinguished municipality owes outstanding debts, it will be presumed in every such case that the legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist shall accompany the territory and property into the jurisdiction to which the territory is annexed. *Colchester v. Scaber*, 3 Burr. 1866.

Neither argument nor authority is necessary to prove that a State legislature cannot pass a valid law impairing the obligations of a contract, as that general proposition is universally admitted. Contracts under the Constitution are as sacred as the Constitution that protects them from infraction, and yet the defence in this case, if sustained, will establish the proposition that the effect of State legislation may be such as to deprive a party of all means of sustaining an action of any kind for their enforcement. Cases, doubtless, may arise when the party cannot collect what is due under the contract; but he ought always to be able by some proper action to reduce his contract to judgment.

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Suppose it be admitted that the act of the State legislature annulling the charter of the municipality indebted to the complainant, without making any provision for the payment of outstanding indebtedness, was unconstitutional and void, still it must be admitted that the very act which annulled that charter annexed all the territory and property of the municipality to the two appellant towns, and that they acquired with that the same power of taxation over the residents and their estates that they previously possessed over the estates of the inhabitants resident within their limits before their boundaries were enlarged.

Extinguished municipal corporations neither own property, nor have they any power to levy taxes to pay debts. Whatever power the extinguished municipality had to levy taxes when the act passed annulling her charter terminated, and from the moment the annexation of her territory was made to the appellant towns, the power to tax the property transferred, and the inhabitants residing on it, became vested in the proper authorities of the towns to which the territory and jurisdiction were by that act transferred; from which it follows that for all practical purposes the complainant was left without judicial remedy to enforce the collection of the bonds or to recover judgment for the amounts they represent.

When the appellant towns accepted the annexation, their authorities knew, or ought to have known, that the extinguished municipality owed debts, and that the act effecting the annexation made no provision for their payment. They had no right to assume that the annulment of the charter of the old town would have the effect to discharge its indebtedness, or to impair the obligation of the contract held by its creditors to enforce the same against those holding the territory and jurisdiction by the authority from the legislature and the public property and the power of taxation previously held and enjoyed by the extinguished municipality.

Express provision was made by the act annulling the charter of the debtor municipality for annexing its territory to the appellant towns; and when the annexation became complete, the power of taxation previously vested in the inhabitants of the annexed territory as a separate municipality ceased to exist, whether to pay debts or for any other purpose, — the reason being that the power, so far as respected its future exercise, was transferred with the territory and the jurisdiction over its inhabitants to the appellant towns, as enlarged by the annexed territory; from which it follows, unless it be held that the extinguishment of the debtor municipality discharged its debts without payment, which the Constitution forbids, that the appellant towns assumed each a proportionate share of the outstanding obligations of the debtor town when they acquired the territory, public property, and municipal jurisdiction over every thing belonging to the extinguished municipality.

Corporations of a municipal character, such as towns, are usually organized in this country by special acts or pursuant to some general State law; and it is clear that their powers and duties differ in some important

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particulars from the towns which existed in the parent country before the Revolution, where they were created by special charters from the crown, and acquired many of their privileges by prescription, without any aid from Parliament. Corporate franchises of the kind granted during that period partook much more largely of the nature of private corporations than do the municipalities created in this country, and known as towns, cities, and counties. Power exists here in the legislature, not only to fix the boundaries of such a municipality when incorporated, but to enlarge or diminish the same subsequently, without the consent of the residents, by annexation or set-off, unless restrained by the Constitution, even against the remonstrance of every property holder and voter within the limits of the original municipality.

Property set off or annexed may be benefited or burdened by the change, and the liability of the residents to taxation may be increased or diminished; but the question, in every case, is entirely within the control of the legislature, and, if no provision is made, every one must submit to the will of the State, as expressed through the legislative department. Inconvenience will be suffered by some, while others will be greatly benefited in that regard by the change. Nor is it any objection to the exercise of the power that the property annexed or set off will be subjected to increased taxation, or that the town from which it is taken or to which it is annexed will be benefited or prejudiced, unless the Constitution prohibits the change, since it is a matter, in the absence of constitutional restriction, which belongs wholly to the legislature to determine. Courts everywhere in this country hold that, in the division of towns, the legislature may apportion the burdens between the two, and may determine the proportion to be borne by each. *Sill v. The Village of Corning*, 15 N. Y. 297; *Mayor v. State*, ex rel. of *the Board of Police of Baltimore*, 15 Md. 376; *City of Olney v. Harvey*, 50 Ill. 453; *Borough of Dunmore's Appeal*, 52 Pa. St. 374.

Public property and the subordinate rights of a municipal corporation are within the control of the legislature; and it is held to be settled law that, where two separate towns are created out of one, each, in the absence of any statutory regulation, is entitled to hold in severalty the public property of the old corporation which falls within its limits. *North Hempsted v. Hempsted*, 2 Wend. (N. Y.) 109; *The Hartford Bridge Company v. East Hartford*, 16 Conn. 149, 171.

Extensive powers in that regard are doubtless possessed by the legislature; but the Constitution provides that no State shall pass any "law impairing the obligation of contracts," from which it follows that the legislature, in the exercise of any such power, cannot pass any valid law impairing the right of existing creditors of the old municipality. 1 Dillon, *Municipal Corp.* (2d ed.), sect. 41; *Van Hoffman v. City of Quincy*, 4 Wall. 535, 554; *Lee County v. Rogers*, 7 id. 181, 184; *Buta v. City of Muscatine*, 8 id. 575, 583; *Furman v. Nichol*, id. 44, 62.

Where a municipal corporation has the power to contract a debt, it has, says Dixon, C. J., by necessary implication, authority to resort to

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the usual mode of raising money to pay it, which undoubtedly is taxation. *State ex rel. Hasbrouck v. The City of Milwaukee*, 25 Wis. 122, 133.

Whenever the charter of a city, at the time of the issue of bonds, made it the duty of the city authorities to levy and collect the amount, when reduced to judgment, like other city charges, the same court held that a subsequent act of the legislature prohibiting the city from levying such a tax would be repugnant to the Constitution. *Soutter v. The City of Madison*, 15 id. 30.

State control over the division of the territory of the State into cities, towns, and districts, unless restricted by some constitutional limitation, is supreme, but the same court admits that it cannot be exercised to annul another regulation of the Constitution. *Chandler v. Boston*, 112 Mass. 200; 6 Cush. (Mass.) 580.

Cities or towns, whenever they engage in transactions not public in their nature, act under the same pecuniary responsibility as individuals, and are as much bound by their engagements as are private persons, nor is it in the power of the legislature to authorize them to violate their contracts. *The Western Saving Fund Society v. The City of Philadelphia*, 31 Pa. St. 175, 185.

Text-writers concede almost unlimited power to the State legislatures in respect to the division of towns and the alteration of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract. 1 Dillon, *Municipal Corp.*, sect. 128; *Blanchard v. Bissell*, 11 Ohio St. 96; *Lansing v. County Treasurer*, 1 Dill. 522, 528.

Concessions of power to municipal corporations are of high importance; but they are not contracts, and consequently are subject to legislative control without limitation, unless the legislature oversteps the limits of the Constitution. *Layton v. New Orleans*, 12 La. Ann. 515.

Bonds having been issued and used by a city for purchasing land for a park, which was pledged for the payment of the bonds, held, that a subsequent act of the legislature authorizing a sale of a portion of the park, free of all liens existing by virtue of the original act, was in violation of the Federal Constitution, as impairing the obligation of contracts. *Brooklyn Park Com. v. Armstrong*, 45 N. Y. 234, 247.

Laws passed by a State impairing the obligation of a contract are void, and if a State cannot pass such a law, it follows that no agency can do so which acts under the State with delegated authority. Cooley, *Const. Lim.* (4th ed.) 241; Angell & Ames on Corp. (9th ed.), sects. 332, 333.

Municipal debts cannot be paid by an act of the legislature annulling the charter of the municipality, and, if not, then the creditors of such a political division must have some remedy after the annulment takes place. Without officers, or the power of electing such agents, a municipal corporation, if it can be so called, would be an entity very difficult

to be subjected to judicial process or to legal responsibility; but when the entity itself is extinguished, and the inhabitants with its territory and other property are transferred to other municipalities, the suggestion that creditors may pursue their remedy against the original contracting party is little less than a mockery. Public property, with the inhabitants and their estates, and the power of taxation, having been transferred by the authority of the legislature to the appellants, the principles of equity and good conscience require that inasmuch as they are, and have been for nearly twenty years, in the enjoyment of the benefits resulting from the annexation, they shall in due proportions also bear the burdens. *New Orleans v. Clark*, 95 U. S. 644, 654.

Equitable rules of decision are sufficiently comprehensive in their reach to do justice between parties litigant, and to overcome every difficulty which can be suggested in this case. States are divided and subdivided into such municipalities, called counties, cities, towns, and school districts, and the legislature of every State is required every year to pass laws modifying their charters and enlarging or diminishing their boundaries. Nor are the questions presented in this case either new in principle or difficult of application. New forms are given to such charters in every day's experience, when the limits of an old corporation are changed by annexation of new territory, or portions of the territory of the old municipality are set off and annexed to another town. Both corporations, in such a case continue, though it may be that the charters are much changed, and that the inhabitants of the territory annexed or set off fall under different officers and new and very diverse regulations. *Beckwith v. City of Racine*, 7 Biss. 142, 149.

Pecuniary burdens may be increased or diminished by the change; but, in the absence of express provisions regulating the subject, it will be presumed in every case where both municipalities are continued, that the outstanding liabilities of the same remain unaffected by such legislation. Unlike that in this case, the charter of the old town was vacated and annulled, from which it follows that the same principles of justice require that the appellant towns, to which the territory, property, and inhabitants of the annulled municipality were annexed, should become liable for its outstanding indebtedness. *Decree affirmed.*

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE BRADLEY, dissenting.

I am of opinion that it requires legislation to make a legal obligation against the new town, and make the apportionment of the debt; and I dissent on that ground from the judgment and opinion of the court in this case.

BREWIS v. CITY OF DULUTH AND VILLAGE OF DULUTH. 17

1881. 3 McCrary U. S. Circuit Court Reports, 219.

U. S. CIRCUIT COURT for District of Minnesota.

In equity. Demurrer to bill of complaint.

This suit is brought against the city of Duluth and the village of Duluth to recover the coupons overdue upon bonds of the City of Duluth, in this district. A demurrer is interposed by the village of Duluth.

Gilman & Clough, for demurrer.

Williams & Davidson, contra.

NELSON, District Judge. The complainant is the owner of certain bonds issued under an act of the legislature of Minnesota, approved March 8, 1873, authorizing the city of Duluth to fund the debt previously incurred for improving the harbor, and for other purposes. The bonds were payable in not less than 20 nor more than 30 years from the date of their issue, and bear interest at the rate of 7 per cent. per annum, payable semi-annually in the city of New York. The complainant became a *bona fide* holder of the bonds and coupons previous to 1875.

It appears that on February 23, 1877, the legislature of the state of Minnesota created the village of Duluth out of a part of the territory of the city of Duluth, under an act entitled "An act to create the village of Duluth, * * * and to apportion the debts of the city of Duluth between itself and the village of Duluth, and provide for the payment thereof."

This act carved the village out of the city limits, taking and embracing in the village all the business part of the city and business houses, the harbor, railroad depots and tracks, nearly all the dwelling-houses, all the population except about 100 inhabitants, and nineteen-twentieths of all the taxable property; and no provision was made for the payment of the debts of the city by the village unless creditors would accede to the terms imposed by the legislature as hereinafter stated. It also appears that on February 28, 1877, an act was passed entitled "An act to amend the act entitled an act to incorporate the city of Duluth," approved March 5, 1870, and this act declared that the service of all summons and process in suits against the city of Duluth should be made on the mayor of the city, and that service made on any other officer should not be valid against the city. It also provided that the term of the office of mayor should cease on the following April, 1877, and no provision was made for the election of a successor or for filling a vacancy; that no taxes should be levied without the affirmative vote of all, to-wit, four aldermen; and since the passage of the act there have never been four aldermen in the city qualified to act. There is a section authorizing the levy of taxes by the county of St. Louis, in which the city is situated, but all taxes thus levied and collected must be paid to the village of Duluth.

@ to recover

Village created out of part of city

Most of prop. transferred to village //

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On the facts admitted by the demurrer the complainant is entitled to relief. The legislature undoubtedly had the right to create the village of Duluth out of the territory of the city, and, as between the city and the village, apportion the existing indebtedness; but when the corporation which created the debt is shorn of its population and taxable property to such an extent that there is no reasonable expectation of its meeting the present indebtedness, and it is unable so to do, the creditors, at least, can enforce a proportionate share of their obligations against the two corporations carved out of one. Both are liable to the extent of the property set off to each respectively.

Pale

The debt of the city at the time the village was created by act of February 23, 1877, was about \$400,000, and the act creating the village of Duluth authorized an apportionment of the debts as follows:

City debt \$400,000

Section 3, in substance, provides that after one year from February 23, 1877, the village shall become jointly liable with the city on all bonds issued prior to the passage of this act, unless it shall within the year take up and cancel, as hereinafter provided, \$218,000 of the evidence of indebtedness outstanding of the city, provided that interest to January 1, 1878, on all bonds and maturing coupons shall be treated and regarded as part of said evidence of outstanding indebtedness.

\$218,000

Section 4 enacts that not more than \$100,000 of village 6 per cent. 30-year bonds shall be issued for taking up outstanding bonds and orders of the city of Duluth to the amount of \$218,000, and interest thereon to January 1, 1870. These bonds are to be placed in the possession of the judge of the Eleventh judicial district of the state of Minnesota.

Section 5 enacts that persons holding bonds, matured coupons, or orders of the city of Duluth prior to the passage of this act may surrender the same to the judge of the district court for exchange for the bonds of the village of Duluth; and whenever \$218,000 has been surrendered, the judge shall issue to the persons so surrendering, the bonds of the village of Duluth to one-fourth of the amount so surrendered, and on the delivery of the village bonds shall cancel the amount of city bonds received in exchange.

city stands?

Other sections provide for annexation of more land from the city limits.

This statute interferes with the rights of creditors. The obligations of a municipal corporation are not affected, although the name may be changed and the territory increased or diminished, if the new organization embraces substantially the same territory and the same inhabitants. It may be true that generally creditors, to obtain relief, must look exclusively to the corporation creating the debt; but when a state of facts exists as disclosed here, and the old corporation is diminished in population, wealth, and territory to the extent admitted, it would be a mockery of justice to withhold the relief asked.

Answer

Without at this time considering more fully the question presented, whether the several acts of February 25, 1877, and February 28, 1878, impair the obligations of the contract between the city of Duluth and its creditors, it is clear to my mind that the bill on its face contains sufficient equity and calls for an answer.

The demurrer is overruled, and the defendant can have until January rule-day to answer.

McCABY, Circuit Judge, concurred.¹

— *et al.*
1 writs of
 MERIWETHER v. GARRETT.

1880. 102 U. S. 472.²

APPEAL from U. S. Circuit Court for Western District of Tennessee.

In Equity. The original bill was filed against the city of Memphis, Jan. 28, 1879, by Garrett *et al.*; alleging, in substance, that the plaintiffs are holders of overdue bonds and coupons of the city, upon much of which indebtedness they had secured judgments and writs of mandamus to compel the collection thereof; but that the city and its officials have for years failed to collect the taxes assessed. The bill prays for the appointment of a receiver, under the act of March 19, 1877, to take charge of the city assets, including bills for past due taxes, and to collect all outstanding claims due to the city, and to settle the debts of the city.

By an act passed Jan. 29, 1879, and approved Jan. 31, 1879, the legislature repealed certain specifically named acts incorporating Memphis and amending its charter. The act of 1879 also provides that the charters of all municipal corporations in this State having a population of 35,000, or over, (which Memphis had) "be and the same are hereby repealed, and all municipal offices held thereunder are abolished." The said act further provided that "the population within the territorial limits as now defined, and the territory of all municipal corporations heretofore governed" under certain specified statutes (which are hereby repealed) "are hereby resolved back into the body of the State, and

¹ Upon the final hearing, at June term, 1882, the court, from evidence given, found that the city of Duluth "is now in a condition to meet its matured obligations, and, prospectively, all others as they mature." The court said that the taxable property in the city "has already increased nearly or quite fourfold, and is advancing rapidly." "There is, therefore, no legal or equitable reason, in the light of authority, for going behind the legislative apportionment." The court reaffirmed the intrinsic correctness of the view taken in the above opinion given upon the demurrer, but said: "The case, as now before the court, is very different from that presented on demurrer." The bill was dismissed. 13 Fed. Rep. 334. — Ed.

² The statement is abridged, adopting largely the condensed statement in the opinion of FIELD, J., p. 502-510. The dissenting opinion of STRONG, J., is omitted; also portions of the opinion of FIELD, J. — Ed.

all offices held under and by virtue of said repealed sections are hereby abolished; and all power of taxation, in any form whatever, heretofore vested in or exercised by the authorities of said municipal corporations by virtue of any of the acts of incorporation hereinbefore recited, or otherwise, is for ever withdrawn and reserved to the legislature; and the public buildings, squares, promenades, wharves, streets, alleys, parks, fire-engines, hose and carriages, horses and wagons, engine-houses, engineer instruments, and all other property, real and personal, hitherto used by such corporations for municipal purposes, are hereby transferred to the custody and control of the State, to remain public property, as it has always been, for the uses to which said property has been hitherto applied. And no person holding office under and by virtue of any of said repealed sections, or any of the acts above recited, shall, from and after the passage of this act, exercise or attempt to exercise any of the powers or functions of said office.

On the same day with the passage of the repealing act, the legislature passed another act to establish taxing districts in the State, and to provide the means for their local government. It declared that the several communities embraced in the territorial limits of the repealed corporations, and of such other corporations as might surrender their charters under the act, were created taxing districts in order to provide the means of local government for their peace, safety, and general welfare; that the necessary taxes for the support of the governments thus established should be imposed directly by the General Assembly, and not otherwise; that in administering the affairs and providing the means of local government the following agencies and instrumentalities were established, — namely, a board of fire and police commissioners; a committee on ordinances or local laws, to be known as the legislative council of the taxing district; a board of health, and a board of public works; and it prescribed in detail the duties and powers of these local agencies. The act prohibited the commissioners from issuing any bonds, notes, scrip, or other evidences of indebtedness, or from contracting for work, material, or services in excess of the amount levied for them for that year; and declared that no property, real or personal, held by them for public use should ever be subject to execution, attachment, or seizure under any legal process for any debt created by them; that all taxes due, or moneys in the hands of the county trustee, or on deposit, should be exempt from seizure under attachment, execution, garnishment, or other legal process. It also declared that no writ of *mandamus* or other process should lie to compel them or other governing agencies to levy any taxes, and that neither the commissioners, nor trustee, nor the local government should be held to pay or be liable for any debt created by the extinct corporations, and that none of the taxes collected under the act should ever be used for the payment of any of said debts. The act also declared that all the property previously used by the corporations for purposes of government was transferred to the custody and control of the board of commissioners of the taxing dis-

Taxing
districts
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tricts, to remain public property for the uses to which it had previously been applied, and that all indebtedness for taxes or otherwise, whether in litigation or not, due to the extinct municipalities, should vest in and become the property of the State, to be disposed of for the settlement of their debts as should thereafter be provided by law.

In February, 1879, the plaintiffs filed an amended and supplemental bill, making certain officials co-defendants, and alleging that the above acts of Jan. 31, 1879, were unconstitutional. Bills were also filed by other judgment creditors. Feb. 12, 1879, the court ordered that the several causes be consolidated, and appointed Latham receiver. The order directs the receiver (inter alia) to take possession of all the real and personal property of the city, except certain property used for public purposes; to collect rents from city property; and to collect unpaid taxes.

March 14, 1879, the legislature passed an act, providing, as to the municipal corporations whose charters may have been repealed, that the governor "shall appoint an officer for such extinct corporations respectively, to be known as a receiver and back-tax collector." The act required said officer to take possession of all books, papers, and documents pertaining to the assessment and collection of taxes, which had been levied at the time of the repeal of the charters. It ordered him to file a bill in the Chancery Court of the county in which the corporation was situated, in the name of the State, in behalf of all creditors against all its delinquent tax-payers, and provided that taxes assessed prior to 1875 might be settled in the valid indebtedness of the extinct municipality, whether due or not, and that the receiver should receive evidences of such indebtedness at certain designated rates. It also prohibited him from coercing payment of a greater sum than one-fifth of the taxes in arrears annually, so as to distribute the whole through five equal annual instalments, commencing from his appointment and qualification. It authorized the Chancery Court to enforce all liens upon property for the payment of taxes, and to order all sales necessary for their collection; and to settle and adjust all equities, priorities, and liens; and to give to the defendants and creditors all the relief which might be given if there were as many separate suits as there were creditors and delinquent tax-payers. It provided that the taxes as collected should be paid into the State treasury, and be paid out to parties entitled to receive them, as adjudged by the Chancery Court, upon the warrant of the receiver, countersigned by the Chancellor. It required the receiver, in paying the money collected into the treasury, to distinguish the sources whence it was derived, showing the amount from each special and general tax, so that they might be kept separate, and be paid out to creditors according to the priority, lien, or equity determined. The act was accompanied with a proviso that it should not interfere with any vested rights entitling parties to a speedy collection.

Under this act, Meriwether was appointed by the governor receiver

to collect
unpaid taxes

and for

to collect
back taxes
etc

and the back-tax collector of Memphis. The plaintiffs subsequently amended their bill by making Meriwether a defendant.

To the bill, as consolidated and amended, the defendants demurred. Upon this demurrer several questions arose, on which the judges of the Circuit Court were divided in opinion. The prevailing opinion of the presiding judge being against the demurrer, it was overruled. Judgment was rendered in favor of plaintiffs. The decree adjudged that Latham, the receiver, should proceed to collect the assets and property of the city (including back-taxes) in the manner directed by the previous order of the court. It also enjoined Meriwether from attempting to collect or interfere with the assets in the possession of the said receiver. And the decree further adjudged that all the property within the limits of the territory of the city of Memphis was liable and might be subjected to the payment of all the debts of the city, and that such liability would be enforced thereafter, from time to time, in such manner as the court might direct.

From the decree the defendant appealed.

Joseph B. Heiskell, George Davitt, and Minor Meriwether, for appellants.

William M. Randolph, contra.

MR. CHIEF JUSTICE WAITE announced the conclusions reached by the court as follows:—

1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn.

2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality, has not been generally accepted.

3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature.

4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief. Whether taxes levied in obedience to contract

Decree
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obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it.

5. The receiver and back-tax collector appointed under the authority of the act of March 13, 1879, is a public officer, clothed with authority from the legislature for the collection of the taxes levied before the repeal of the charter. The funds collected by him from taxes levied under judicial direction cannot be appropriated to any other uses than those for which they were raised. He, as well as any other agent of the State charged with the duty of their collection, can be compelled by appropriate judicial orders to proceed with the collection of such taxes by sale of property or by suit or in any other way authorized by law, and to apply the proceeds upon the judgments.

6. The bills in this case cannot be amended so as to obtain relief against the receiver and back-tax collector, without making an entirely new suit. They were not framed with a view to any such purpose.

7. The decree of the court below is reversed.

8. The cause is remanded, with instructions to dismiss the bills, without prejudice. If, on the settlement of the accounts of the receiver herein, it shall be found he has any money in his hands collected on taxes levied under judicial direction to pay judgments in favor of any persons who have become parties to this suit, an order may be made directing its appropriation to the payment of such judgment.

Upon the first, second, third, and fifth of these propositions the judgment of the court is unanimous. Upon the fourth, sixth, seventh, and eighth it is by a majority only.

MR. JUSTICE FIELD. Mr. Justice Miller, Mr. Justice Bradley, and myself concur in the judgment rendered, but, as the judgment is not accompanied by a statement of the reasons on which it is founded, I proceed to state those which have controlled us.

[After stating the case.]

This decree is manifestly erroneous in its main provisions. It proceeds upon the theory that the property of every description held by the municipality at the time of its extinction, whether held in its own right or for public uses, including also in that designation its uncollected taxes, were chargeable with the payment of its debts, and constituted a trust fund, of which the Circuit Court would take possession and enforce the trust; and that the private property of the inhabitants of the city was also liable, and could be subjected by the Circuit Court to the payment of its debts. In both particulars the theory is radically wrong.

The right of the State to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be

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enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text-writers. There is no contract between the State and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them. *United States v. Railroad Co.*, 17 Wall. 322; *Commissioners v. Lucas, Treasurer*, 93 U. S. 108; *People v. Morris*, 13 Wend. (N. Y.) 325; *Philadelphia v. Fox*, 64 Pa. St. 169; *Montpelier v. East Montpelier*, 29 Vt. 12; *Angell & Ames, Corp.* (10th ed.), sect. 31; *Dill. Mun. Corp.*, sect. 30; *Cooley, Const. Lim.* 192, 193. By the repeal the legislative powers previously possessed by the corporation of Memphis reverted to the State. A portion of them the State immediately vested in the new government of the taxing district, with many restrictions on the creation of indebtedness. A portion of them the State retained; it reserved to the legislature all power of taxation. It thus provided against future claims from the improvidence or recklessness of the new government. The power of the State to make this change of local government is incontrovertible. Its subsequent provision for the collection of the taxes of the corporation levied before the repeal of its charter, and the appropriation of the proceeds to the payment of its debts, remove from the measure any imputation that it was designed to enable the city to escape from its just liabilities.

But while the charter of a municipal corporation may be repealed at the pleasure of the legislature, where there is no inhibition to its action in the Constitution of the State, the lawful contracts of the corporation, made whilst it was in existence, may be subsequently enforced against property held by it, in its own right, as hereafter described, at the time of the repeal. In this respect its position is not materially different from that of a private individual, whose property must, upon his decease, go to the satisfaction of his debts before those who succeed to his rights can share in its distribution.

[As to the language used in *Broughton v. Pensacola*, 93 U. S. 266, p. 268.] It means that whatever property a municipal corporation holds subject to the payment of its debts, will, after its dissolution, be so administered and applied by a court of equity.

What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the State. In its streets, wharves,

cemeteries, hospitals, court-houses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use. The dissolution of the charter does not divest the trust so as to subject property of this kind to a liability from which it was previously exempt. Upon the dissolution, the property passes under the immediate control of the State, the agency of the corporation then ceasing. 2 Dillon, Mun. Corp., sects. 445, 446; *Schaffer v. Cadwallader*, 36 Pa. St. 126; *City of Davenport v. Peoria Marine & Fire Insurance Co.*, 17 Iowa, 276; *Askins v. Commonwealth*, 1 Duv. (Ky.) 275; *The President, &c. v. City of Indianapolis*, 12 Ind. 620.

In the third place, we say that taxes previously levied, but not collected on the dissolution of the corporation, do not constitute its property; and in the absence of statutory authority they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the corporation. Taxes are not debts. It was so held by this court in the case of *Oregon v. Lane County*, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the tax-payer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States — and we believe in Tennessee — an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *City of Augusta v. North*, 57 Me. 392; *City of Camden v. Allen*, 2 Dutch. (N. J.) 398; *Perry v. Washburn*, 20 Cal. 318. Nor are they different when levied under writs of *mandamus* for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. The writs of *mandamus* only require the officers of assessment and collection to obey existing law. In neither case are the taxes liens upon property unless made so by statute. *Philadelphia v. Greble*, 38 Pa. St. 339; *Howell v. Philadelphia*, id. 471; 2 Dillon, Mun. Corp., sect. 659. Levied only by authority of the legislature, they can be altered, postponed, or released at its pleasure. A repeal of the law, under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provision for its continuance is made in the repealing act, though the tax may be revived and enforced by subsequent legislation. We say generally, for there are some exceptions, where the tax provided is so connected with a contract, as the inducement for its execution, that the courts will hold the repeal of the law to be invalid as impairing the obligation of the contract. It is

not of such taxes, constituting the consideration of contracts, that we are speaking, but of ordinary taxes authorized for the support of government, or to meet some special expenditure; and these, until collected, — being mere imposts of the government, created and continuing only by the will of the legislature, — have none of the elements of property which can be seized like debts by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation. They are in no proper sense of the term assets of the corporation. They are only the means provided for obtaining funds to support its government and pay its debts, and disappear as such means with the revocation of the charter, except as the legislature may otherwise provide. When they are collected, the moneys in the hands of the collecting officer may be controlled by the process of the courts, and applied by their direction to the uses for which the taxes were levied; but until then there is nothing in existence but a law of the State imposing certain charges upon persons or property, which the legislature may change, postpone, or release, at any time before they are enforced. So long as the law authorizing the tax continues in force, the courts may, by mandamus, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone, and the office of the collector abolished, there is nothing upon which the courts can act. — The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one. — It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.

It is the province of the courts to decide causes between parties, and, in so doing, to construe the Constitution and the statutes of the United States, and of the several States, and to declare the law, and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration.

[After referring to *Rees v. Watertown*, 19 Wallace, 107, 116; and

It is not the money, but the law which controls it

Levying is not a judicial act

Can the courts levy taxes?

Heine v. Levee Com'rs of New Orleans, 1 Woods, 247, and 19 Wallace, 655.] These authorities — and many others to the same purport might be cited — are sufficient to support what we have said, that the power to levy taxes is one which belongs exclusively to the legislative department, and from that it necessarily follows that the regulation and control of all the agencies by which taxes are collected must belong to it.

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by *mandamus* against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been abolished and the power withdrawn, the remedy of the creditors is by an appeal to the legislature, which alone can give them relief. No Federal court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal court, it cannot seize the power which belongs to the legislative department of the State and wield it in their behalf.

To return to the question propounded: what is the property of a municipal corporation which, on its dissolution, the courts can reach and apply to the payment of its debts?

We answer, it is the private property of the corporation, that is, such as it held in its own right for profit or as a source of revenue, not charged with any public trust or use, and funds in its possession unappropriated to any specific purpose. In this respect the position of the extinct corporation is not dissimilar to that of a deceased individual: it is only such property as is possessed, freed from any trust, general or special, which can go in liquidation of debts.

The decree of the Circuit Court proceeding upon a different theory of its control over the uncollected taxes of the repealed corporation, and of the property which could be applied to the payment of its debts, cannot be maintained.

On another ground, also, the decree is equally untenable. It adjudges that "all the property within the limits of the territory of the city of Memphis is liable, and may be subjected to the payment of all the debts" for which the suits are brought, and that "such liability shall be enforced thereafter, from time to time, in such manner" as the court may direct.

In no State of the Union, outside of New England, does the doctrine obtain that the private property of individuals within the limits of a municipal corporation can be reached by its creditors, and subjected to the payment of their demands. In Massachusetts and Connecticut, and perhaps in other States in New England, the individual liability of the

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inhabitants of towns, parishes, and cities, for the debts of the latter, is maintained, and executions upon judgments issued against them can be enforced against the private property of the inhabitants. But this doctrine is admitted by the courts of those States to be peculiar to their jurisprudence, and an exception to the rule elsewhere prevailing. Elsewhere the private property of the inhabitants of a municipal body cannot be subjected to the payment of its debts, except by way of taxation; but taxes, as we have already said, can only be levied by legislative authority. The power of taxation is not one of the functions of the judiciary; and whatever authority the States may, under their constitutions, confer upon special tribunals of their own, the Federal courts cannot by reason of it take any additional powers which are not judicial.

Power of taxation
not one of
functions
of judiciary

[After quoting from *Rees v. Watertown*, 19 Wallace, 107, p. 122.]

It is pressed upon us with great earnestness by counsel, that unless the Federal courts come to the aid of the creditors of Memphis, and enforce, through their own officers, the taxes levied before the repeal of its charter, they will be remediless. But the conclusion does not follow. The taxes levied pursuant to writs of mandamus issued by the Circuit Court are still to be collected, the agency only for their collection being changed. The receiver appointed by the governor has taken the place of the collecting officers of the city. The funds received by him upon the special taxes thus levied cannot be appropriated to any other uses. The receiver, and any other agent of the State for the collection, can be compelled by the court, equally as the former collecting officers of the city, to proceed with the collection of such taxes by the sale of property or by suit, or in any other way authorized by law, and to apply the proceeds upon the judgments. If relief is not thus afforded to the creditors, they must appeal to the legislature. We cannot presume that the appeal will be in vain. We cannot say that on a proper representation they will not receive favorable action.

Creditors not
remediless.

It is certainly of the highest importance to the people of every State that it should make provision, not merely for the payment of its own indebtedness, but for the payment of the indebtedness of its different municipalities. Hesitation to do this is weakness; refusal to do it is dishonor. Infidelity to engagements causes loss of character to the individual; it entails reproach upon the State.

The Federal judiciary has never failed, so far as it was in its power, to compel the performance of all lawful contracts, whether of the individual, or of the municipality, or of the State. It has unhesitatingly brushed aside all legislation of the State impairing their obligation. When a tax has been authorized by law to meet them, it has compelled the officers of assessment to proceed and levy the tax, and the officers of collection to proceed and collect it, and apply the proceeds. In some instances, where the tax was the inducement and consideration of the contract, all attempts at its repeal have been held invalid. But this has been the limit of its power. It cannot make laws when the State

has the power

refuses to pass them. It is itself but the servant of the law. If the State will not levy a tax, or provide for one, the Federal judiciary cannot assume the legislative power of the State and proceed to levy the tax. If the State has provided incompetent officers of collection, the Federal judiciary cannot remove them and put others more competent in their place. If the State appoints no officers of collection, the Federal judiciary cannot assume to itself that duty. It cannot take upon itself to supply the defects and omissions of State legislation. It would ill perform the duties assigned to it by assuming power properly belonging to the legislative department of the State.

[MR. JUSTICE STRONG, with whom concurred MR. JUSTICE SWAYNE and MR. JUSTICE HARLAN, delivered an opinion dissenting from the action of the majority of the court in reversing the decree of the court below and ordering a dismissal of the complainants' bill.

One of his positions was, that the levy of a tax is a very distinct thing from the collection of a tax already levied. The levy is generally a legislative or a quasi-judicial act. The collection of a tax after it has been levied is a ministerial act, which a court has power to enforce.

His opinion concludes thus :

I think the decree should be modified by striking out so much of it as subjects to the payment of the debts of the city the property held exclusively for public uses, and so much as subjects to such payment the private property of all persons within the city's territorial limits.

Thus modified, I think the decree should be affirmed.]¹

MOBILE v. WATSON.

MOBILE v. UNITED STATES, EX REL. WATSON. 19

1886. 116 U. S. 289.²

ERROR to U. S. Circuit Court for Southern District of Alabama.

The object of the first of these suits was the recovery of a judgment for money, and of the second the enforcement, by the writ of mandamus, of the judgment recovered in the first. They were argued as one

¹ In *Luehrman v. Taxing District of Shelby County*, A. D. 1879, 2 Lea, Tenn. 425, a majority of the Supreme Court of Tennessee held, that the charter of Memphis had been constitutionally repealed, and also that the establishment of the Taxing District was constitutional. In *O'Connor v. Memphis*, A. D. 1881, 6 Lea, Tenn. 730, (where *scire facias* was issued requiring the Taxing District of Shelby County to show cause why the suit should not be revived against it,) a majority of the Supreme Court of Tennessee held, "that the Taxing District of Shelby County is so far the successor of the late corporation of the city of Memphis, or the same corporation under a new name, that a suit pending against the old corporation may be revived against the new, and prosecuted to judgment." The court did not decide as to the creditor's remedy for collecting his judgment.—Ed.

² Statement abridged. Argument and part of opinion omitted.—Ed.

case. In the first case Henry Watson, the defendant in error, was the plaintiff in the Circuit Court. He brought his action against the Port of Mobile to recover the principal money due on certain bonds issued by the City of Mobile, under its corporate name. . . .

By the act of 1859, the City of Mobile was authorized to issue bonds to aid in the construction of a railroad under such contract as the City might make with the railroad company, and was vested with power to adopt the ordinances necessary to carry out such contract. The City thereafter contracted with the railroad company to issue the bonds of the City, and to annually provide a certain sum to be applied to the payment thereof by a special tax; and to pass an ordinance to accomplish this result. The City did accordingly pass an ordinance providing for the annual levy and collection of such a special tax. The bonds now held by Watson were issued to the railroad company, and sold by it, upon the faith of the act of the legislature and the aforesaid contract and ordinance of the City of Mobile.

In 1879 the legislature repealed the charter of the City of Mobile; and on the same day passed an act incorporating the Port of Mobile. All the territory included in the Port of Mobile was embraced within the limits of the City of Mobile. The area of the City comprised about 17 square miles; and that of the Port about 8 square miles. All the thickly settled part of the City was included in the Port; the excluded portion consisting of sparsely settled suburbs of little value. Fourteen-fifteenths of the inhabitants of the City were inhabitants of the Port. Out of more than \$16,000,000 of taxable property of the City, all but \$900,000 was included within the limits of the Port.

The act repealing the charter of the City provided for the appointment of commissioners, to whom the City property and claims should be turned over; and who should apply the proceeds of such assets to the payment of debts of the City, the floating debt to be paid first. The act expressly declared that the commissioners should have no power to levy any tax. By a subsequent act the commissioners of the City were required to turn over to the officials of the Port all the real and personal property formerly held by the City "for public use and governmental purposes," except only the wharves. It was not pretended that payment could or would be made to the bondholders out of the assets of the City in the hands of the commissioners. The act incorporating the Port of Mobile provided for a Police Board, empowered to levy and collect taxes to a limited amount, for the purpose of defraying the expenses of carrying out the provisions of the act. By a subsequent act it was expressly provided that the Police Board should not levy any other tax than the one authorized by the preceding act.

Plaintiff, Watson, recovered judgment against the Port of Mobile. Execution was issued, and returned "no property found." Watson then filed a petition, praying for a writ of mandamus, to compel the

mandamus
recovery of bonds
all the
City lost their
taxing power.

City of Mobile

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Port of Mobile and its officers charged with the levying and collection of taxes to assess, levy, and collect a special tax for the payment of the judgment.

The court ordered the writ to issue against the Port of Mobile and the Police Board.

The original judgment against the Port of Mobile, and the judgment rendered upon the petition for mandamus, were both brought up for review by the writ of error sued out by the Port of Mobile.

Hannis Taylor and *J. Little Smith* (*Braxton Bragg* with them), for plaintiff in error.

Gaylord B. Clark and *James E. Webb*, for defendants in error.

Woods, J. [After stating the case.] We are of opinion, upon this state of the statutes and facts, that the Port of Mobile is the legal successor of the City of Mobile, and liable for its debts. The two corporations were composed of substantially the same community, included within their limits substantially the same taxable property, and were organized for the same general purposes.

Where the legislature of a State has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new. In illustration and support of this proposition, the following cases are in point:

In *Girard v. Philadelphia*, 7 Wall. 1, it was held by this court that the annexation to the City of Philadelphia, having a territory of only two square miles, of twenty-eight other municipalities with all their inhabitants, comprising districts, boroughs, and townships of various territorial extent, and the changing of its name, did not destroy its identity or impair its right to hold property devised to it.

So in *Broughton v. Pensacola*, 93 U. S. 266, 270, it was said by Mr. Justice Field, in delivering judgment, that when "a new form is given to an old corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs, and in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liability

ties as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization."

In *O'Connor v. Memphis*, 6 Lea, 780, the Supreme Court of Tennessee went so far as to say that — "Neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these combined, will destroy the identity, continuity, or succession of the corporation if the people and territory reincorporated constitute an integral part of the corporation abolished.

. . . The corporators and the territory are the essential constituents of the corporation, and its rights and liabilities naturally adhere to them."

In *Mount Pleasant v. Beckwith*, 100 U. S. 514, a municipal corporation had been dissolved and its territory divided between and annexed to three adjacent corporations. Upon this state of facts the court held that, unless the legislature otherwise provided, the corporations to which the territory and the inhabitants of the divided corporation had been transferred, were severally liable for their proportionate share of its debts, and were vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing therein. See also *Colchester v. Seaber*, 3 Burrow, 1866; *Cuddon v. Eastwick*, 1 Salk. 192; *People v. Morris*, 18 Wend. 325; *New Orleans Railroad Co. v. City of New Orleans*, 26 La. Ann. 478.

[After referring to *Amy v. Selma*, recently decided by the Supreme Court of Alabama.]

This construction of these statutes of the State of Alabama by its highest court being in accord with our own views, and in harmony with former decisions of this court on the same general subject, is decisive of the question in hand, unless there is some material difference between the legislation concerning the City of Selma and that concerning the City of Mobile. The only difference that can be supposed to have any bearing upon the question under discussion is, that the act incorporating Selma embraced the same territory as that covered by the City of Selma, whereas the Port of Mobile covered little more than half the territory embraced by the City of Mobile. We think this difference between the two cases is an immaterial one. The Supreme Court of Alabama, in the case of the *Mobile and Spring Hill Railroad Co. v. Kennerly*, 74 Ala. 566, assumed that the City of Mobile and the Port of Mobile had substantially the same corporators and the same boundaries. And we are of opinion that the exclusion from the limits of the Port of Mobile of the sparsely settled suburbs of the City of Mobile, a territory of little value, as fairly appears by the record, and consisting, as stated by the counsel for plaintiff, without contradiction, largely of fields, swamps and land covered with water, will not serve to distinguish this case from the case of *Amy v. Selma*. We repeat, therefore, that in our judgment the Port of Mobile is the legal successor of the City of Mobile, and bound for its debts.

It follows from this proposition that the remedies necessary to the collection of his debt, which the law gave the creditor of the City of Mobile, remain in force against the Port of Mobile. The laws which establish local municipal corporations cannot be altered or repealed so as to invade the constitutional rights of creditors. So far as such corporations are invested with subordinate legislative powers for local purposes, they are the mere instrumentalities of the States, for the convenient administration of their affairs, and are subject to legislative control. But when empowered to take stock in or otherwise aid a railroad company, and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect the engagements of private individuals. *Broughton v. Pensacola*, 93 U. S. 266; *Mount Pleasant v. Beckwith*, 100 U. S. 514.

Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void. *Von Hoffman v. Quincy*, 4 Wall. 535; *Edwards v. Kearzey*, 96 U. S. 595; *Ralls County Court v. United States*, 105 U. S. 733; *Louisiana v. Pillsbury*, 105 U. S. 278; *Louisiana v. Mayor of New Orleans*, 109 U. S. 285. These propositions receive strong support from the decisions of the Supreme Court of Alabama. *Commissioners of Limestone County v. Rather*, 48 Ala. 433; *Edwards v. Williamson*, 70 Ala. 145; *Slaughter v. Mobile County*, 73 Ala. 134.

It follows that the contract by which, under authority of the legislature, the City of Mobile agreed to levy a special tax for the payment of the principal and interest of the class of bonds to which those held by the plaintiff belong is still in force, and its obligation rests upon its legal successor, the Port of Mobile.

All laws passed since the making of the contract, whose purpose or effect is to take from the City of Mobile, or its successor, the power to levy the tax and pay the bonds, are invalid and ineffectual, and will be disregarded. Mr. Justice Field, when delivering the judgment of this court in *Wolff v. New Orleans*, 103 U. S. 358, 368, said: "The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her and upon the continuance of which alone they can be enforced, can proceed, and by mandamus compel, at the instance of the parties interested, the exercise of that power, as if no such legislation had ever been attempted." And so in

City stock
in force
Port

Port of Mobile
Can't impair
71
78

Laws destroying
power to tax
void

Ralls County Court v. United States, 105 U. S. 733, 738, it was said by the Chief Justice, speaking for the court, that "all laws of the State which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid, and, under the well settled rule of decision in this court, the Circuit Court had authority, by mandamus, to require the County Court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent."

The Port of Mobile has the machinery and officers requisite for the assessment of property and for the levy and collection of taxes to carry on the City government. There is no reason why the taxes necessary to pay the judgment of the plaintiff cannot be levied and collected by the same officers. There is no obstacle to the full and complete performance by the Port of Mobile and the Mobile Police Board of the duties required by the peremptory writ of mandamus issued by the Circuit Court.

It follows from the views we have expressed that the judgment of the Circuit Court in favor of the plaintiff for \$7308.80 and costs against the Port of Mobile, and the judgment directing the peremptory writ of mandamus to be issued against the Port of Mobile and the Mobile Police Board for the satisfaction of such judgment, are both warranted by law.

*Judgments affirmed.*¹

Effect is to
invalidate
the judgment
of the Circuit Court
in favor of the plaintiff
for \$7308.80 and costs
against the Port of Mobile
and the Mobile Police Board
for the satisfaction of such
judgment.

SHAPLEIGH v. CITY OF SAN ANGELO.

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1897. 167 U. S. 646.²

ERROR to U. S. Circuit Court for Western District of Texas.

Action against the city of San Angelo, a city incorporated Feb. 10, 1892, under the laws of the State of Texas. Plaintiff seeks to recover for the amount of certain unpaid coupons for interest on bonds issued by a municipal organization, styled "the city of San Angelo," which, from January 18, 1889, to Dec. 15, 1891, exercised the powers of an incorporated city within territorial limits including all the territory afterwards embraced within the limits of the defendant corporation; and claiming to have been incorporated by certain entries made Jan. 18, 1889, upon the records of the commissioner's court of Tom Green

¹ "In *Deveraux v. City of Brownsville*, 29 Fed. Rep. 742, the ruling in *Mobile v. Watson*, *supra*, was followed and extended, it being declared not only that the succeeding corporation was liable for the existing debts of its predecessor, but that all the powers of taxation possessed by such predecessor, which had been conferred as a part of the remedy to which its creditors were entitled, survived to the new corporation, and that their exercise could be compelled by mandamus. It was also held that statutes which prohibited the exercise of these powers of taxation were void, as impairing the obligation of contracts." 1 Dillon's Mun. Corp., 4th ed., page 250, note 2. — Ed.

² Statement abridged. Portions of opinion omitted. — Ed.

County. Other material facts are stated in the opinion. The Circuit Court gave judgment for the defendant.

T. K. Skinker, for plaintiff in error.

No appearance for defendant in error.

SHIRAS, J. In January, 1889, the city of San Angelo was existing and acting as an organized municipal corporation, with a mayor, a board of aldermen and other functionaries. In pursuance of an ordinance of the city council in May, 1889, there were issued the bonds in question in this case. It was not denied that the proceedings were regular in form, that the bonds were duly executed and registered as required by law, that the proceeds of their sale were properly applied to improving the streets and public highways of the city, and that the plaintiff was a *bona fide* holder for value.

As things then stood, it is plain that the city could not have set up to defeat its obligations any supposed irregularity or illegality in its organization. The State, being the creator of municipal corporations, is the proper party to impeach the validity of their creation. If the State acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked.

This is the general rule, and it is recognized in Texas: "If a municipality has been illegally constituted, the State alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter." *Graham v. City of Greenville*, 67 Texas, 62.

But, in 1890, at the fall term of the district court of Tom Green County, an information was filed by the county attorney against named persons, who were exercising and performing the duties, privileges and functions of a mayor and city council of the city of San Angelo, claiming the same to be a city duly and legally incorporated under the laws of the State, and alleging that said city was not legally incorporated, and that said named persons were unlawfully exercising said functions. Such proceedings were had that on December 15, 1891, the said district court entered a decree ousting the said persons from their said offices, and adjudging that the incorporation of said city of San Angelo be, and the same was thereby, abolished and declared to be null and void. The record does not distinctly disclose the ground upon which the court proceeded in disincorporating said city, but enough appears to justify the inference that the incorporation included within its limits unimproved pasture lands, outside of the territory actually inhabited, and that the incorporation was declared invalid for that reason.

Subsequently, on February 10, 1892, the city of San Angelo was again incorporated, excluding the unimproved lands, but including all the improved part of the prior incorporation, and in which existed the streets and highways in the construction of which the proceeds of the said bonds had been expended.

What was the legal effect of the disincorporation of the city of San Angelo and of its subsequent reincorporation as respects the bonds in

suit? Did the decree of the district court of Tom Green County, abolishing the city of San Angelo as incorporated in 1889, operate to render its incorporation void *ab initio*, and to nullify all its debts and obligations created while its validity was unchallenged? Or can it be held, consistently with legal principles, that the abolition of the city government, as at first organized, because of some disregard of law, and its reconstruction so as to include within its limits the public improvements for which bonds had been issued during the first organization, devolved upon the city so reorganized the obligations that would have attached to the original city if the State had continued to acquiesce in the validity of its incorporation?

[After referring to *Broughton v. Pensacola*, 93 U. S. 266; *Mount Pleasant v. Beckwith*, 100 U. S. 520; and *Mobile v. Watson*, 116 U. S. 289:]

The conclusions reached by this court may be thus expressed: The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities. Dillon's Mun. Corp. vol. 1, § 172, 4th ed.

This view of the law has been accepted and followed by the Supreme Court of the State of Texas. [Citing and stating *Morris v. State*, 62 Texas, 728, 730.]

The conclusion which is derivable from the authorities cited, and from the principles therein established, is that the disincorporation by legal proceedings of the city of San Angelo did not avoid legally subsisting contracts, and that upon the reincorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligation of the old devolved upon the new corporation.

The doctrine successfully invoked in the court below by the defendant, that where a municipal incorporation is wholly void *ab initio*, as being created without warrant of law, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation, which had obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody, except the State acting by direct proceedings. Such an organization is merely voidable, and if the State refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the State intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor. [The court then considered the legal

effect of the Texas statute of April 18, 1891; which the Texas court has construed as requiring a vote of the taxpaying voters in favor of assuming the debt before the new incorporation can be held for it.]

... Said act so construed must be regarded, as respects prior cases, as an act impairing the obligations of existing contracts. If the law, before the passage of the act of 1891, was that, by a voluntary reincorporation and a taking over of the property rights of the old corporation, the existing obligations devolved upon the new corporation, it would plainly not be a legitimate exercise of legislative power, as affecting such prior obligations, to substitute an obligation contingent upon a vote of the taxpayers.

When we hold that the new corporation, under the facts disclosed by this record, is subject to the obligations of the preceding corporation, we mean subject to them as existing legal obligations, in manner and form as they would have been enforceable had there been no change of organization.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

PEOPLE ET REL. GAUEN v. NIEBRUEGGE. 21

1910. 244 Ill. 82.

CARTER, J.¹ This was an information in the nature of *quo warranto* filed by the State's attorney of Monroe county in the circuit court of said county on March 11, 1909, at the request of nine owners of land, questioning the legality of the organization and existence of Moredock and Ivy Landing Drainage District No. 1 of Monroe County, Illinois, and right of the defendants in error, Henry Niebruegge, William Feldmeier, Sr., and John Herbst, to hold the office of drainage commissioners of said district. Defendants in error entered their appearance and filed a plea to the information, to which plea plaintiff in error demurred. The demurrer was overruled and plaintiff in error elected to abide by his demurrer and declined to plead further. Thereupon the trial court entered judgment in favor of defendants in error, finding that they were not guilty of usurping the office of drainage commissioners, as charged in the information. Plaintiff in error has sued out of this court a writ of error to review the judgment.

It is next insisted that the rights and franchises of this district were dormant for many years, and that on that account a dissolution of the corporation should be declared and its charter forfeited. It appears from the facts set up in the plea that the district was in active opera-

¹ Part of the opinion only is given. — Ed.

It has been held by this court that drainage districts should be classed as municipal corporations. *Commissioners of Drainage District v. Kelsey*, 120 Ill. 482; *Elmore v. Drainage Commissioners*, 135 id. 269; *Badger v. Inlet Drainage District*, 141 id. 540. In Dillon on Municipal Corporations (vol. 1, 4th ed. sec. 168, p. 245), that author states that the doctrine of forfeiture of the right to be a corporation has no just or proper application to municipal corporations, and "if they neglect to use powers in which the public or individuals have an interest, and the exercise of such powers be not discretionary, the courts will interfere and compel them to do their duty. On the other hand, acts done beyond the powers granted are void. . . . In short, unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can, in the author's judgment, only be dissolved by the legislature or pursuant to legislative enactment. They may become inert or dormant, or their functions may be suspended for want of officers or of inhabitants; but dissolved, when created by an act of the legislature and once in existence, they cannot be by reason of any default or abuse of the powers conferred, either on the part of officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision." Municipal corporations can cease to exist only by legislative consent or pursuant to legislative provision, and a failure for a term of years to exercise the functions of a municipality does not effect a dissolution. *Cain v. Brown*, 111 Mich. 657; *State v. Stevens*, 21 Kan. 210. A public corporation is not dissolved by failure to elect officers. *People v. Wren*, 4 Scam. 269; *President and Trustees v. Thompson*, 20 Ill. 197; *People v. Town of Fairbury*, 51 id. 149; *School Directors v. School Directors*, 135 id. 464; 1 Smith on Corp., 1908 ed., sec. 479, p. 446. Municipal corporations are subject to legislative control, and may be changed, modified, restrained or abolished to suit the exigencies of the case. *City of Chicago v. Town of Cicero*, 210 Ill. 290, and cases cited. While drainage districts may not be strictly municipal corporations, they are public corporations, (*People v. Anderson*, 239 Ill. 266; *People v. Hepler*, 240 id. 196) organized for a special and limited purpose. *Elmore v. Drainage Comrs.*

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Exercise

supra. They are created by the statute, and we think, on reason and authority, the rules of law governing the dissolution of municipal corporations must be held to apply to drainage districts.

In 1889 an act was passed authorizing the dissolution of any drainage district by order of the county court of the county wherein the same was organized, upon a hearing upon a verified petition signed by not less than four-fifths of the adult land owners of such district, owning not less than three-fourths of the assessed land. Hurd's Stat. 1908, par. 191, p. 876. We think it is obvious, not only from the authorities on this subject but from the provisions of the Levee act and of the act just referred to, that the legislature did not intend that the district should be dissolved except in the manner provided by the said act of 1889. It is not claimed that any attempt has been made, under said provision of the statute, to dissolve this district. It is further provided in section 1 of the act for the dissolution of drainage districts that they can be dissolved only when "no indebtedness of such district exists." The plea filed in the court below stated that the aggregate sum collected for the execution of drainage work was \$31,537.79; and that there had been expended for the work the aggregate sum of \$41,000, and that to secure the funds to complete said work, bonds were issued by said district, some of which were still outstanding and unpaid. On this state of facts the district could not be dissolved by the court, even on the petition of the necessary property owners, until these bonds were paid.

Cannot dissolve
- see debt pd.

The district did not forfeit its corporate powers by non-user. Neither, as we have seen, was the corporation dissolved by failure to elect officers. The drainage commissioners appointed in 1895 and 1897 continued in office until their successors were chosen and qualified. *Trustees of Schools v. Cowden*, 240 Ill. 39; *People v. Morrell*, 234 id. 47. The county court had the authority to appoint, as it did, the defendants in error commissioners under section 62 of the said Levee act. Hurd's Stat. 1908, p. 838.

We find no reversible error in the record. The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

CHALSTRAN v. BOARD OF EDUCATION.

1910. 244 Ill. 470.

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on K's field
school, case.
Time

This is an action of assumpsit brought in November, 1907, in the circuit court of Knox County, by E. A. Chalstran, appellee, against the Board of Education of Township High School District 13, range 1, east, Knox county, Illinois, appellant. On March 2, 1906, appellee entered into a written contract with said board to build a high school building for \$1,560. Before that date a petition had been filed for an

election to vote for or against the discontinuance of said township high school. Appellee knew of this petition at the time he executed the contract. At the election held on April 2, 1906, it was voted to discontinue the school.¹

CARTER, J. It is conceded that the vote to discontinue the high school district was taken in accordance with the law, the sole question in dispute being as to the effect of that vote. Section 44 of article 3 of the School law (Hurd's Stat. 1908, p. 1920), after providing for the canvass of the ballots in an election held as to the discontinuance of a high school, reads: "If the majority of the votes at such election shall be found in favor of discontinuing the high school, it shall be the duty of the trustees to discontinue the same, and turn all the assets of the said high school over to the school fund of the township or townships interested therein, in proportion to the assessed valuation of said townships, to be used as any other township fund for school purposes." This law was in force at the time said vote to discontinue was taken. It is practically the only section of the statute which has a direct bearing on the closing up of the affairs of a high school district so discontinued.

Public corporations are but parts of the machinery employed in carrying on the affairs of the State, and they are subject to be changed, modified or destroyed, as the exigencies of the public may demand. *Trustees of Schools v. Tatman*, 13 Ill. 27; *Amy v. Watertown*, 130 U. S. 301. The legislature has supreme power over them, and may divide, alter, enlarge or abolish them, as in the legislative judgment the public welfare may require. *City of Chicago v. Town of Cicero*, 210 Ill. 290; *Town of Cicero v. City of Chicago*, 182 id. 301; *People v. McBride*, 234 id. 146. Municipal corporations can only be dissolved through legislative authority. 1 Dillon on Mun. Corp., 4th ed., 168. But the legislative authority over municipal corporations is not in all respects unlimited. That authority is regulated and controlled by the provisions of the national and State constitutions. 1 Dillon on Mun. Corp., 4th ed., sec. 65. The rights and franchises of municipal corporations, being granted for purposes of government, are not such vested rights, as against the State, that they cannot be taken away, nor does the charter of a municipal corporation constitute a contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated. Cooley's Const. Lim., 7th ed., 266. While the charter itself can be modified or abolished, if a municipal corporation has become indebted under its charter, the rights of a creditor based upon the obligation of a contract cannot be impaired by any subsequent legislative enactment. 1 Dillon on Mun. Corp. (4th ed.) secs. 63, 69; *Wolf v. New Orleans*, 103 U. S. 358; *Milner's Admr. v. Pensacola*, 2 Wood (U. S. Cir. Ct.), 662.

The record shows that the high school district in question had been established only a year previous to the date of the vote to discontinue.

¹ The remainder of the facts are omitted. — Ed.

Counsel for the appellant insist that the legislature could not have intended that these two votes were to be taken within a year, and that a fair construction of the law does not require the high school district to be abolished as soon as the vote to discontinue is taken. They argue that if a high school is being conducted, the legislature must have intended that it should continue until the end of the then current school year. Beyond question, under the authorities, the legislature could make such conditions as appellant contends it did make by the existing laws. But no such conditions are found in the statute. The statute only provides that on the vote being canvassed the high school shall be discontinued and the assets turned over to a certain fund.

Appellant further argues that if the effect of this vote was to abolish the high school immediately, then it must necessarily follow that the part of the contract which was not completed, if not binding upon both parties, could not be binding on either. Appellant insists that section 44 of the School law was in force at the time the contract was entered into and had become a part of it. *Barrett v. Bodie*, 158 Ill. 479; *Abbott on Mun. Corp.* sec. 88. Appellee knew, at the time he entered into this contract with the high school board, of the legislative provision authorizing the discontinuance of the district. If, fairly construed, this statute shows that the legislative intention was as contended for by appellant, then such intention must be carried out unless it be in contravention of the State or Federal constitution. The same obligation to perform contracts rests upon a municipal corporation as upon a natural person, unless a plain, clear provision in the charter provides otherwise. The statutory provision referred to authorized the high school to be discontinued; but is it to be presumed, on the wording of this statute, that the legislature intended to absolve the district from this liability to contractors or creditors whose rights had become vested? Such a law, conceding that the legislature has the constitutional right to enact it, would place persons contracting with municipal corporations on a basis so insecure that few would care to enter into municipal contracts. *Morris & Cummings v. State*, 62 Tex. 728.

Counsel for appellee contend that the same rule applies to this contract after it was repudiated by the vote of the people as would apply to an ordinary contract between individuals, — that is, they claim that the injured party has the right to pursue either of three remedies: First, to treat the contract as rescinded and recover upon a *quantum meruit* so far as it has been performed; or, second, to keep the contract alive for the benefit of both parties being at all times himself ready and able to perform it, and at the end of the time specified sue and recover under the contract; or, third, to treat the repudiation as putting an end to the contract for the purposes of performance and sue for the profits he would have realized if the contract had been completed. *Lake Shore and Michigan Southern Railway Co. v. Richards*, 152 Ill. 59; *Wells v. National Life Ass'n of Hartford*, 53 L. R. A. 38, note b; 99 Fed. Rep. 222. We have no authority that passes on

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the precise question here involved. In *Potts v. Supervisors*, 25 Wis. 506, the court held that the repeal of a statute rendered nugatory an executory contract. The United States Supreme Court has held that section 10 of article 1 of the United States Constitution, prohibiting any State from passing a law impairing the obligation of contracts, applies as well to executory as executed contracts. *Cooley's Const. Lim.*, 7th ed., p. 884. Said section 44 of the School law, as we have seen, became a part of this contract at the time of its execution. In this case appellee recovered only for the profits that he proved he would have realized had he completed the contract. We do not find it necessary to consider or decide whether he would have been entitled, under the contract and statute, to go ahead and complete the high school building and then recover for the full amount. It is proper, however, to state that wise public policy would seem to sanction the course that was pursued. After the high school district was discontinued a completed high school building would be of little value to the township. Appellee's right to profits in this contract should not be taken from him without his consent, unless the right to do so is reserved in the contract or in the law, which is necessarily a part of the contract. *Cooley's Const. Lim.*, 7th ed., p. 392. Ordinarily the State is liable for prospective profits, on breach of contract, to the same extent as an individual. *Masterton v. Mayor*, 42 Am. Dec. (N. Y.) 138, and note; *Danolds v. State*, 89 N. Y. 36; 26 Am. & Eng. Ency. of law, 2d ed., p. 478, and cases there cited. If under this provision of the statute it was intended that appellee should have no right to the profits for that part of the contract which he had not completed, then his right to such profits would not be vested. We do not think it was so intended. Considering the various provisions of the High School law, we are disposed to hold that under the present wording of the statute, fairly construed, the high school district was liable, even after the vote to discontinue, for the profits that would have accrued to appellee had he completed his contract.

The question still remains whether the action should have been brought against the board of trustees of the former high school district or against some other school official or board. Was the high school district absolutely abolished as soon as the vote was taken and canvassed? This court has held that the effect of the dissolution of a municipal corporation by *quo warranto* proceedings was to destroy it as a public institution; that thereafter it could neither sue nor be sued, convey property or make further contracts. *Dodge v. People*, 113 Ill. 491. It has also been held that the absolute repeal of a charter destroys all officers under it and puts an end to the tenure of office of the incumbents. *Crook v. People*, 106 Ill. 237; *People v. Brown*, 83 id. 95; 28 Cyc. 256, and cases cited. Whatever the legislative intention with reference to the transactions into which said high school district has entered and which were then authorized by law, it was not intended that the high school authorities, after the vote to discontinue, could

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originate new business, except that necessary to close up the affairs of the district. *Greenwood v. Freight Co.*, 105 U. S. 13. The legislature has provided by statute how private corporations shall close up their business affairs, and has specifically stated that such corporations shall be capable of prosecuting and defending suits, and that all remedies against such corporations, their stockholders or officers, for liabilities incurred previous to the dissolution, shall not be taken away or impaired. Hurd's Stat. 1908, chap. 32, secs. 10-12, p. 526. The legislature could have made the same specific provisions with reference to municipal corporations, but it has not done so. It has been held that where public corporations have been absolutely dissolved without making any provision for the payment of their obligations, and where no municipal successor has been created, a creditor has only the faith of that legislature upon which to rely. *Barkley v. Levee Comrs.*, 93 U. S. 258; *Bates v. Gregory*, 89 Cal. 387. Yet this conclusion is reached by the courts with great reluctance and only when no other possible construction can be placed upon the legislature. Municipalities may have their boundaries modified, their names changed or one may be merged in another, or they may be divided and portions of their territory annexed, but it will be presumed that the legislature intended that the liabilities as well as the rights of property of the corporation shall accompany it into the jurisdiction of the territory which annexes or incorporates it. *Mt. Pleasant v. Beckwith*, 100 U. S. 514; *Shapleigh v. San Angelo*, 167 id. 646. If the changes do not amount to an absolute dissolution, the remedies necessary for the collection of the debt of the creditor will remain in force. *Mobile v. Watson*, 116 U. S. 289. Where the rights of creditors are involved, the presumption is extremely strong that the identity of the corporation continues notwithstanding different powers are possessed by the new organization and different officers administer its affairs. 1 Dillon on Mun. Corp., 4th ed., sec. 172. If there are in existence any assets in the hands of public officials and there are no remedies at law by which creditors can enforce the payment of obligations from such assets, courts of equity will take jurisdiction and direct the application of the taxes so collected to the use for which they were levied. "The ancient doctrine, that upon the repeal of a private corporation its debts were extinguished and its real property reverted to its grantors and its personal property vested in the State, has been so far modified by modern adjudications that a court of equity will now lay hold of the property of a dissolved corporation and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution, and the contracts may be enforced by a court of equity so far as to subject, for their satisfaction, any property possessed by the corporations at the time. In the view of equity its property constitutes a trust fund pledged to the payment of the debts of creditors and stockholders, and if a municipal corporation, upon the surrender or extinction, in other ways, of its

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charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation." *Broughton v. Pensacola*, 98 U. S. 266; *Meriwether v. Garrett*, 102 id. 472; *O'Connor v. Memphis*, 74 Tenn. 730.

It appears from the stipulation of facts that the taxes for the high school district levied for 1905 have been collected and are in the hands of the township treasurer, the proper official to hold them for the high school district when it was in existence and the proper official to hold them for the present public authorities. We think these taxes, and assets, if any, of the high school district, are properly subject to the payment of the legal obligations of said high school district.

Did the legislature, by the act here in question, authorize the high school officials to close up its affairs? Said section 44 provides that after canvassing the vote, if found to be in favor of discontinuance, it shall be the duty of the trustees to discontinue the high school and turn all the assets of said high school over to the school fund of the township or townships interested therein, in proportion to the assessed valuation of the townships. In this case the high school district was in one town and the duty of turning over the assets would be comparatively simple, but if the high school district were formed of two or more townships or parts of townships, and had property, not in money, belonging to it, such as a high school building, then it would be necessary, before the assets could be divided among the various townships in proportion to the assessed valuation of such townships, that the trustees dispose, in some way, of the property. We think the legislature intended by this statute that the trustees of the township high school should not only have the power to divide the assets, but in order to divide them proportionately they should previously settle all liabilities against the high school district. If this be the fair construction of the statute, then, necessarily, the high school district could sue and be sued after the vote in favor of discontinuance. The funds collected for the purpose of building this high school are properly in the hands of the township treasurer of the township in which the former high school district was located. They are, however, subject to the payment of this judgment in like manner as they would be if the district were still in existence.

The board of education of the former township high school district was the proper defendant in this case.

The judgment of the Appellate Court must therefore be affirmed.

Judgment affirmed.

Σ interests in bank. *Carroll*

Taxes & assets
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city of
UNITED STATES BANK v. KENDALL

1910. 179 Fed. 914.

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PHILLIPS, District Judge.¹ The plaintiff brought an action in assumpsit against the defendant, a municipal corporation of Hamilton county, Kan., to recover judgment on certain improvement bonds and coupons issued by it. Writ of summons was duly issued thereon, directed to the United States marshal of this district, who made the following return thereon:

"Received the within writ March 21, 1908, and served the same upon the within-named city of Kendall, in the county of Hamilton, in the state of Kansas, by delivering to J. E. Johnson, mayor, personally, a true and certified copy of this writ with all indorsements thereon, at Randall, Kan., on the 24th day of March, 1908."

Johnson was mayor of city.
There was no appearance by the defendant at the time as required, or at any other time. But at the return term the said J. E. Johnson, appearing only for the purpose of the motion, filed motion to set aside said service of summons, on the ground that he had never been, and is not now, mayor, officer, or representative of any kind or in any capacity of the defendant city; that the said city had been for over 15 years last past, and still is, incapacitated from appearing herein as a municipal corporation; that it had ceased to exist as such for a long time prior to the commencement of this action.

not properly returned

Furthermore, the affidavit of Johnston in support of his motion does not assert that the defendant was never duly created a municipal corporation, or that it had ever been dissolved. It only represents that it had failed to elect a board of directors for a series of years, and that the attempt to nominate him as mayor was abortive. The statute of Kansas (Gen. St. Kan. 1905, c. 23, art. 5) [provides] how such corporation may be dissolved:

"First by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

By another provision of the statute it is provided that the term of all elective or appointive officers shall be for specified period, and until their successors are elected and qualified.

¹ Part of the opinion is omitted. — Ed.

Dillon in his work on Corporations (4th ed. vol. 1, § 166), speaking to this subject, says:

"Here it is the people of the locality who are erected into a corporation, not for private, but for public or *quasi* public, purposes. The corporation is mainly and primarily if not wholly an instrument of government. The officers do not constitute the corporation, or an integral part of it. The existence of the corporation does not depend upon the existence of officers. The qualified voters or electors have, indeed, the right to select officers; but such officers are the mere agents or servants of the corporation, and hence the doctrine of a dissolution by the loss of an integral part has, in such cases, no place. If all the people of the defined locality should wholly remove from or desert it, the corporation would, from necessity, be suspended or dormant, or perhaps entirely cease; but the mere neglect or mere failure to elect officers will not dissolve the corporation, certainly not while the right or capacity to elect remains. In this respect municipal corporations resemble ordinary private corporations, which exist *per se*, and consist of the stockholders who compose the company. The officers are their agents or servants, but do not constitute an integral part of their corporation, the failure to elect whom may suspend the functions, but will not dissolve the corporation."

See *Welch v. Ste. Genevieve*, 1 Dill. 130, Fed. Cas. No. 13,372.

It is matter of public history that some communities under municipal charters, with more enterprise than discretion — optimistic of the future, but little reckoning of the day of redemption — have in the past put upon open market bonds, garish with gilt and tempting with high rates of interest. When the confiding purchaser comes to demand payment he finds a bankrupt town. Under the suggestion of some leader resort is taken to the coup d'etat of either having the governing board resign, or the voters to forget to hold any more elections. So that when the process server comes with the writ of summons the village school master appears and proclaims, "*Ilium fuit*," suggesting a return of *non est inventus*. But the law says in such contingency the writ may be served upon the designated officer last in office. *Salamanca Township v. Wilson*, 109 U. S. 627, 3 Sup. Ct. 844, 27 L. Ed. 1055; *Welch v. Ste. Genevieve*, 1 Dill. loc. cit. 133, Fed. Cas. No. 13,372; *Muscantine Turnverein v. Funck*, 18 Iowa, 469. If in such contingency it be disputed that the person served was not such officer, *de jure* or *de facto*, the question may be tested by the undissolved corporation by the recognized plea. If it has no representative to thus protect it, it is the author of its own misfortune. The way of the transgressor always has been and always will be hard.

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SECTION 2. *Legislative Control.*

PEOPLE EX REL. LE ROY v. HURLBUT ET AL. 24

1871. 24 Michigan, 44.¹INFORMATIONS in the nature of *quo warranto*.

These proceedings are brought to test the right of the members of the boards of water commissioners, and of sewer commissioners of the city of Detroit, to continue to hold their respective offices after the taking effect of the act establishing a board of public works; and the questions raised relate to the validity of said act.

The act² transfers to the board of public works all the powers, duties, and responsibilities of the old board of water commissioners, the board of sewer commissioners, and of the commissioners of grades and plans. It gives the board charge and control of the construction of all public buildings except school-houses, public sewers, drains, and water-works. It authorizes the board to take proceedings to condemn property by the right of eminent domain; to contract for the performance of the various works confided to their charge, to employ workmen, to draw upon the proper funds for payment of expenses, and to issue bonds in certain cases to obtain means for carrying on any of said works.

The first members of the board are appointed by the legislature, and in the act itself. They are four in number, and are to hold by classified terms of two, four, six, and eight years. All vacancies, whether by expiration of term of service or otherwise, shall be filled by the common council of the city; and no person shall be eligible for said board who is not a freeholder in said city and a qualified elector.

COOLEY, J. [After discussing other points.] We have before us a legislative act creating for the city of Detroit a new board, which is to exercise a considerable share of the authority usually possessed by officers locally chosen; to have general charge of the city buildings, property and local conveniences, to make contracts for public works on behalf of the city, and to do many things of a legislative character which generally the common council of cities alone is authorized to do. The legislature has created this board, and it has appointed its members; and both the one and the other have been done under a claim of right which, unless I wholly misunderstand it, would justify that body in taking to itself the entire and exclusive government of the city, and the appointment of all its officers, excepting only the judicial,

¹ Three opinions omitted; also the arguments. — ED.

² This statement of the provisions of the act is abridged from the opinion of CHRISTIANCY, J., 24 Mich. p. 55-58, and p. 74. — ED.

for which, by the constitution, other provision is expressly made. And the question, broadly and nakedly stated, can be nothing short of this: Whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure? I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right.

Now, it must be conceded that the judicial decisions and law writers generally assert that the state creates the municipal bodies, endows them with such of the functions of corporate life and entrusts them with such share in the local government, as to the legislative judgment shall seem best; that it controls and regulates their action while they exist, subjects them to such changes as public policy may dictate, and abolishes them at discretion; in short that the corporate entities are mere agencies which the state employs for the convenience of government, clothing them for the time being with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or usefulness of the delegation is no longer apparent. This I understand to be the accepted theory of state constitutional law as regards the municipal governments. We seldom have occasion to inquire whether this amplitude of legislative authority is or is not too strongly expressed, for the reason that its exercise is generally confined within such bounds as custom has pointed out, so that no question is made concerning it. But such maxims of government are very seldom true in any thing more than a general sense; they never are and never can be literally accepted in practice.

Our constitution assumes the existence of counties and townships, and evidently contemplates that the state shall continue to be subdivided as it has hitherto been; but it nowhere expressly provides that every portion of the state shall have county or township organizations. It names certain officers which are to be chosen for these subdivisions, and confers upon the people the right to choose them; but it does not in general define their duties, nor in terms preclude the legislature from establishing new offices, and giving to the incumbents the general management of municipal affairs. If, therefore, no restraints are imposed upon legislative discretion beyond those specifically stated, the township and county government of any portion of the state might be abolished, and the people be subjected to the rule of commissions appointed at the capital. The people of such portion might thus be kept in a state of pupillage and dependence to any extent, and for any period of time the state might choose.

The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be

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somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general frame-work of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

The circumstances from which these implications arise are: *First*, that the constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, *second*, that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system.

DeTocqueville speaks of our system of local government as *the American system*, and contrasts it forcibly with the French idea of centralization, under the influence of which constitutional freedom has hitherto proved impossible. — *Democracy in America*, chapter 5. Lieber makes the same comparison, and shows that a centralized government, though by representatives freely chosen, must be despotic, as any other form of centralization necessarily is. "Self-government," he says, "means everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is; but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality." — *Civil Liberty and Self-Government*, chap. 21. The writer first named, speaking of the New England township government, whose system we have followed in the main, says: "In this

part of the union the impulsion of political activity was given in the townships; and it may almost be said that each of them originally formed an independent nation. When the kings of England asserted their supremacy, they were contented to assume the central power of the state. The townships of New England remained as they were before; and, although they are now subject to the state, they were at first scarcely dependent upon it. It is important to remember that they have not been invested with privileges, but that they seem, on the contrary, to have surrendered a portion of their independence to the state. The townships are only subordinate to the states in those interests which I shall term *social*, as they are common to all the citizens. They are independent in all that concerns themselves; and among the inhabitants of New England, I believe that not a man is to be found who would acknowledge that the state has any right to interfere in their local interests." — *Democracy in America, ubi supra*. Now, if this author is here speaking of the theory of our institutions, he is in error. It is not the accepted theory that the states have received delegations of power from independent towns; but the theory is, on the other hand, that the state governments precede the local, create the latter at discretion, and endow them with corporate life. But, historically, it is as difficult to prove this theory as it would be to demonstrate that the origin of government is in compact, or that title to property comes from occupancy. The historical fact is, that local governments universally, in this country, were either simultaneous with, or preceded, the more central authority. In Massachusetts, originally a democracy, the two may be said to have been at first identical; but when the colony became a representative government, and new bands pushed out into the wilderness, they went bearing with them grants of land and authority for the conduct of their local affairs. — *Hutchinson's Massachusetts Bay*, ch. 1; *Washburn's Jud. Hist. of Mass.* ch. 1; *Body of Liberties*, §§ 62, 66, 72; *Elliot's New England*, Vol. 4, pp. 425, 427.

But in Connecticut the several settlements originated their own governments, and though these were doubtless very imperfect and informal, they were sufficient for the time being, and the central government was later in point of time. — *Trumbull's Hist. of Conn.*, Vol. 1, pp. 132, 498; *Palfrey's New England*, Vol. 1, p. 454. What the colony did was only to confer charters, under which the town authority would be administered within agreed limits, and possibly, with more regularity than before. In Rhode Island, it is also true, that township organization was first in order of time. — *Arnold's Hist., of R. I.*, ch. 7. This author justly remarks, that when the charter of Rhode Island was suspended to bring her under the dominion of Andros, "*the American system of town governments, which necessity had compelled Rhode Island to initiate fifty years before, became the means of preserving the liberty of the individual citizen when that of the state, or colony, was crushed.*" — Vol. 1, p. 487. So in Vermont, the people not only, for a time, conducted

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all their public affairs in towns and plantations, through committees, officers and leaders, nominally appointed and submitted to by general consent and approbation, but they carried on their controversy with New York for some years, without any other organization. — *Williams' Hist. of Vermont*, Vol. 2, p. 163. In New Jersey, as in Massachusetts, towns were chartered in connection with grants of land, and in some instances, those which were made by Nichols, adverse to the proprietary, were suffered to remain after his authority was superseded. — See instances in *Mulford's Hist. of N. J.* pp. 143-4. The charter to Lord Baltimore plainly recognized local government in the provision requiring the laws and ordinances established to conform to the laws, statutes or rights of England. — *Bozman's Hist. of Maryland*, p. 290. And county authorities seem to have existed from the very first, though their statutory organization, if any they had, cannot be traced. — *Bozman*, pp. 299-303. But it cannot be necessary to particularize further. The general fact was, that whether the colonial or local authority should originate first, depended entirely upon circumstances which might make the one or the other the more immediate need. But when both were once established they ran parallel to each other, as they were meant to do, for all time; and what Mr. Arnold says of Rhode Island, may be said generally of the eastern and middle states, that the attempt of the last two Stuarts to overthrow their liberties, was defeated by means of the local organizations. The scheme tried first in England, to take away the corporate charters in order to make the corporators more dependent on the crown, and to restrain them from political action in opposition to the court party, found, in America, the colonial charters alone within the reach of arbitrary power; and though these were taken away or suspended, it was only with such protest and resistance as saved to the people the town governments. In Massachusetts, it was even insisted by the people's deputies that, to surrender local government was contrary to the sixth commandment, for, said they, "men may not destroy their political, any more than their natural lives." So, it is recorded they clung to "the civil liberties of New England" as "part of the inheritance of their fathers." — *Palfrey's New England*, Vol. 3, pp. 381-383; *Bancroft's U. S.*, Vol. 2, pp. 125-127; *Mass. Hist. Col.*, XXI, 74-81. The whole contest with Andros, as well as in New England, as in New York and New Jersey, was a struggle of the people in defense of the right of local government. "Everywhere," says Dunlap, "the people struggled for their rights and deserved to be free." — *Hist. of N. Y.*, Vol. 1, p. 133; and see *Trumbull's Hist. of Conn.*, Vol. 1, ch. 15.

I have confined this examination to the states which have influenced our own polity most; but the same principle was recognized and acted on elsewhere. The local governments, however, were less complete in the states further south, and this, with some of their leading statesmen, was a source of regret. Mr. Jefferson, writing to Governor Tyler

in 1810, speaks of the two great measures which he has at heart, one of which is the division of counties into hundreds. "These little republics," he says, "would be the main strength of the great one. We owe to them the vigor given to our revolution, in its commencement, in the eastern states. . . . Could I once see this, I should consider it as the dawn of the salvation of the republic." — *Jefferson's Works*, Vol. 5, p. 525. Mr. Jefferson understood thoroughly the truth, so quaintly expressed by Bacon, when he said of a burden imposed as compared to one freely assumed, that "it may be all one to the purse, but it worketh diversely upon the courage."

Such are the historical facts regarding local government in America. Our traditions, practice and expectations have all been in one direction. And when we go beyond the general view to inquire into the details of authority, we find that it has included the power to choose in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a state power, have been purely exceptional. The most prominent of these was the case of the mayor of New York, who continued, for a long time after the revolution, the appointee of the governor. But this mode of choice originated when the city was the seat of colonial government, and while it constituted a large part of the colony, and the office was afterwards of such dignity and importance, and was vested with so many general powers, that one of the first statesmen of the nation did not hesitate to resign a seat in the senate of the United States to accept it. — *Hammond's Pol. Hist. of N. Y.*, Vol. 1, p. 197. Moreover, the first constitution of New York was, in important particulars, exceptional. That state had at the time a powerful aristocratic element, by which its first institutions were in a great measure shaped; and a distrust of popular authority was manifest. It is scarcely needful to say that features of that character disappeared when the constitution was revised.

For those classes of officers whose duties are general, — such as the judges, the officers of militia, the superintendents of police, of quarantine, and of ports, by whatever name called, — provision has, to a greater or less extent, been made by state appointment. But these are more properly state than local officers; they perform duties for the state in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general. In the case before us, the officers in question involve the custody, care, management, and control of the pavements, sewers, water-works and public buildings of the city, and the duties are purely local. The state at large may have an indirect interest in an intelligent, honest, upright and prompt discharge of them; but this is on commercial and neighborhood grounds rather than political, and is not much greater or more direct than if the state line excluded the city. Conceding to the state the authority to shape the municipal organiza-

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tions at its will, it would not follow that a similar power of control might be exercised by the state as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. There are cases which assert such power, but they are opposed to what seem to me the best authorities, as well as the soundest reason. The municipality, as an agent or government, is one thing; the corporation, as an owner of property is in some particulars to be regarded in a very different light. The supreme court of the United States held at an early day that grants of property to public corporations could not be resumed by the sovereignty. — *Terrett v. Taylor*, 9 *Cranch*, 43; *Town of Pawlet v. Clark*, *ibid.*, 292; and see *Dartmouth College v. Woodward*, 4 *Wheat.*, 694-698. When the state deals with a municipal corporation on the footing of contract, it is said by Trumbull, J., in *Richland v. Lawrence*, 12 *Ill.*, 8, the municipality is to be regarded as a private company. In *Detroit v. Corey*, 9 *Mich.*, 195, Manning, J., bases his opinion that the city was liable for an injury to an individual, occasioned by falling into an excavation for a sewer, carelessly left open, upon the fact that the sewers were the private property of the city, in which the outside public or people of the state at large had no concern. In *Warren v. Lyons*, 22 *Iowa*, 351, it was held incompetent for the legislature to devote to other public uses land which had been dedicated for a public square. In *State v. Haben*, 22 *Wis.*, 660, an act appropriating moneys collected for a primary school to the erection of a state normal school building in the same city was held void. Other cases might be cited, but it seems not to be needful. They rest upon the well understood fact that these corporations are of a two-fold character; the one public as regards the state at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens; and that as to the acquisitions they may make in the latter capacity as mere corporations, it is neither just, nor is it competent, for the legislature to take them away, or to deprive the local community of the benefit thereof. There may come a time when from necessity the state must interpose. The state may change municipal boundaries; and then a division of the corporate property may be needful. The state may take away the corporate powers, and then the property must come to the state as trustee for the parties concerned. In either of these cases, undoubtedly, state action becomes essential; and the property may be disposed of according to the legislative judgment and sense of justice; but even then the appropriation must have regard, so far as the circumstances of the case will admit, to the purposes for which the property was acquired, and the interest of those who were corporators when the necessity for state intervention arose.

In view of these historical facts, and of these general principles, the question recurs whether our state constitution can be so construed

as to confer upon the legislature the power to appoint for the municipalities, the officers who are to manage the property, interests, and rights in which their own people alone are concerned. If it can be, it involves these consequences: As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in from abroad, and it is not a remote possibility that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing. As the municipal corporation will have no control, except such as the state may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, and the conveniences to be supplied, it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people, who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on the one side and drawn on the other. As the legislature could not be compelled to regard the local political sentiment in their choice, and would, in fact, be most likely to interfere when that sentiment was adverse to their own, the government of cities might be taken to itself by the party for the time being in power, and municipal governments might easily and naturally become the spoils of party, as state and national offices unfortunately are now. All these things are not only possible, but entirely within the range of probability, if the positions assumed on behalf of the state are tenable. It may be said that these would be mere abuses of power, such as may creep in under any system of constitutional freedom; but what is constitutional freedom? Has the administration of equal laws by magistrates freely chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the constitution the power to establish it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written. If this charter of state government which we call a constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought,

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methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so, — if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give, — this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone.

Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; it consists in the civil and political rights which are absolutely guaranteed, assured and guarded; in one's liberties as a man and a citizen, — his right to vote, his right to hold office, his right to worship God according to the dictates of his own conscience, his equality with all others who are his fellow-citizens; all these guarded and protected, and not held at the mercy and discretion of any one man or of any popular majority. — *Story, Miscellaneous Writings*, 620. If these are not now the absolute right of the people of Michigan, they may be allowed more liberty of action and more privileges, but they are little nearer to constitutional freedom than Europe was when an imperial city sent out consuls to govern it. The men who framed our institutions have not so understood the facts. With them it has been an axiom, that our system was one of checks and balances; that each department of the government was a check upon the others, and each grade of government upon the rest; and they have never questioned or doubted that the corporators in each municipality were exercising their franchises under the protection of certain fundamental principles which no power in the state could override or disregard. The state may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

What I say here is with the utmost respect and deference to the legislative department; even though the task I am called upon to perform is to give reasons why a blow aimed at the foundation of our

structure of liberty should be warded off. Nevertheless, when the state reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarch or commune, alone has flourished, we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government, as if even in Anglican liberty, which has been gained step by step, through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled and nothing established.

But I think that, so far as is important to a decision of the case before us, there is an express recognition of the right of local authority by the constitution. That instrument provides (*Art. XV., § 14*) that "judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed, at such time and in such manner as the legislature may direct." It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the constitution; and it may well be asked what there is to localize the elections any more than the appointments. The answer must be, that in examining the whole instrument a general intent is found pervading it, which clearly indicates that these elections are to be by the local voters, and not by the legislature, or by the people of a larger territory than that immediately concerned. I think also that when the constitution is examined in the light of previous and contemporaneous history, the like general intent requires, in language equally clear and imperative, that the choice of the other corporate officers, shall be made in some form, either directly or indirectly, by the corporators themselves.

The previous history I have sufficiently referred to; and it is a part of the public history of the times that the convention which framed the constitution of 1850 had in view as prominent objects, to confide more power to the people, to make officers generally elective, and to take patronage from the executive. We see this in the provisions for the elections of judges, state officers, regents of the university and prosecuting attorneys; in the requirement that banking laws shall be referred to the people for adoption; in the exclusive control given to the supervisors in the settlement of claims against counties, and in the express provision that "the legislature may confer upon organized townships, incorporated cities and villages, and upon the boards of supervisors of the several counties, such powers of a local, legislative and administrative character as they may deem proper." All these were in the direction of popularizing authority. Even the officers who were to perform the duties of master in chancery were required to be elected. When, therefore, we seek to gather the meaning of the constitution from "the four corners of the instrument," it is impossible

Express clause

to conclude that the appointments here prescribed, in immediate connection with elections by the local voters, and by a convention intent on localizing and popularizing authority, were meant to be made at the discretion of the central authority, in accordance with an usage not prevalent since the days of the Stuarts, and which even then was regarded, both in England and America, as antagonistic to liberty and subversive of corporate rights.

So far, then, as the act in question undertakes to fill the new offices with permanent appointees, it cannot be sustained, either on general principles, or on the words of the constitution.

[The Learned Judge then discussed the question whether the legislature might make provisional appointments to put the new system in operation, and whether the first members named in the act would rightfully hold office as provisional incumbents until appointees were named by the common council. He answered these questions in the affirmative, and held that the persons named in the act were entitled to the office as provisional appointees.]

CAMPBELL, C. J., CHRISTIANCY, J., and GRAVES, J., also delivered opinions. They all concurred in the view that the legislature could not appoint members of the board of public works as permanent officers for the full term. On the question whether the legislative appointments could be sustained as a provisional measure, CHRISTIANCY, J., concurred with COOLEY, J., in holding the affirmative. CAMPBELL, C. J., and GRAVES, J., held *contra*.]

COMMONWEALTH v. MOIR. 25

1901. 199 Pa. 534.

QUO WARRANTO to determine the right of respondent to the office of recorder of the city of Scranton.¹

MITCHELL J. Municipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed, and the extent of their powers determined by the legislature, and subject to change, repeal, or total abolition at its will. They have no vested rights in their offices, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania. In *Philadelphia v. Fox*, 64 Pa. 169, 180-81, this court, speaking through SHARSWOOD, J., said: "The city of Philadelphia is a municipal corporation, that is a public corporation created by the government for political purposes, and having subordinate and local powers of legislation. . . . It is merely an

¹ Arguments and part of opinion omitted. — Ed.

agency instituted by the sovereign for the purpose of carrying out in detail the objects of government, essentially a revocable agency, having no vested right to any of its powers or franchises, the charter or act of erection (creation?) being in no sense a contract with the state, and, therefore, fully subject to the control of the legislature who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangements or destroy its very existence with the mere breath of arbitrary discretion. . . . The sovereign may continue its corporate existence and yet assume or resume the appointments of all its officers and agents into its own hands; for the power which can create and destroy can modify and change."

The fact that the action of the state towards its municipal agents may be unwise, unjust, oppressive, or violative of the natural or political rights of their citizens, is not one which can be made the basis of action by the judiciary. "The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise and oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power. . . . If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the mind of the judges to violate fundamental principles of republican government, unless it should be found that these principles are placed beyond legislative encroachment by the constitution." Cooley on Constitutional Limitations, ch. 7, sec. 4 (6 ed. 1890, p. 201).

"If the legislature should pass a law in plain, unequivocal and explicit terms within the general scope of their constitutional powers, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to principles of natural justice, for this would be vesting in the court a latitudinarian authority, which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well being of society, or at least not in harmony with the structure of our ideas of natural government." ROGERS, J., *Commonwealth v. McCloskey*, 2 Rawle, 374.

"It is no part of our business to discuss the wisdom of this legislation. However vicious in principle we might regard it, our plain duty

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is to enforce it provided it is not in conflict with the fundamental law." *Scowden's appeal*, 96 Pa. 422. This subject will be further discussed with reference to our own cases, in considering the argument that the statute violates the spirit of the constitution.

Nor are the motives of the legislators, real or supposed, in passing the act, open to judicial inquiry or consideration. The legislature is the lawmaking department of the government, and its acts in that capacity are entitled to respect and obedience until clearly shown to be in violation of the only superior power, the constitution. "It is urged that the act before us was not passed for this purpose" (as a police regulation) "but as its title expresses, 'to provide for cases where farmers may be harmed by such railroad companies' and it is contended that this shows conclusively that it was the design of the legislature to impose this new burden upon the railroad company for the benefit of the landholders and not for the security of the traveling public. . . . We cannot try the constitutionality of a legislative act by the motives and designs of the lawmakers, however plainly expressed. If the act itself is within the scope of their authority it must stand, and we are bound to make it stand if it will upon any intentment. It is its effect not its purpose which must determine its validity. Nothing but a clear violation of the constitution, a clear usurpation of power prohibited, will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." *SHARSWOOD, J., in Penna. R. R. Co. v. Riblet*, 66 Pa. 164, cited with approval by the present chief justice in *Com. v. Keary*, 198 Pa. 500.

"The merits of the act of March 22, 1877, in relation to cities of the second class . . . are not a subject for our opinion. The only question before us in these cases is upon the power of the legislature to pass this law." *Kilgore v. Magee*, 85 Pa. 401.

It ought not to be necessary to restate principles so fundamental, nor to cite authorities so familiar and so long established. But the range of the argument, and the energy with which it was pressed have seemed to make it proper to set forth clearly the only question before the court, the constitutionality of the statute in question. Much of the argument and nearly all of the specific objections advanced, are to the wisdom and propriety and the justice of the act, and the motives supposed to have inspired its passage. With these we have nothing to do, they are beyond our province and are consideration to be addressed solely to the legislature. This court is not authorized to sit as a council of revision to set aside or refuse assent to ill-considered, unwise or dangerous legislation. Our only duty and our only power is to scrutinize the act with reference to its constitutionality, to discover what if any provision of the constitution it violates. We proceed therefore to the consideration of the specific objections made.

Of the objection that the citizens are deprived of an opportunity of electing the chief executive, it is sufficient to say that there is no con-

stitutional right of election in reference to that office. The legislature might make it permanently appointive, and what they could do permanently they may do temporarily. *Philadelphia v. Fox*, 64 Pa. 169. It is conceded that if the act bore date of approval so near the day of election that the electors would have no proper opportunity to prepare for the election, the postponement would be free from objection. But what is a reasonable or proper opportunity is a question for the legislature. That the prolongation of a temporary appointment to a vacancy beyond an election not unduly close at hand, is unusual and contrary to what citizens are accustomed to regard as their moral and political rights, may be conceded, but that does not make it unconstitutional. Being an exercise of a legal and constitutional right by the legislature, they are answerable for their action only to their constituents.

The objections we have been considering, and in fact nearly all that have been raised in the case, are based on the provisions of the schedule, rather than on the permanent provisions of the act. Much legislative latitude must be allowed to temporary measures incident to the adjustment of changes of municipal system, and this consideration deprives the objections of some of the weight they might otherwise have.

It is further said that the act is unconstitutional because it vests in the governor the discretion of determining when it shall become operative by the appointment of recorders. This again is an objection founded on the temporary expedients of the schedule, and would be sufficiently answered by the considerations already discussed under that head. That statutes making important changes in the law should provide definitely when they shall go into effect is desirable but not essential. The legislature may make them operative from a future date, or within certain limitations make them retroactive. The present act in its first section abolishes the office of mayor and substitutes that of recorder. This without more would operate, as the rest of the act does, from the date of its approval. But to prevent a gap in the government and the resulting confusion of the city business, the schedule in section 2 continues the office of mayor temporarily until the new office of recorder is filled by the governor's appointment under section 1. There is nothing in this that is not entirely within the reasonable province of a schedule for the initial operation of necessary changes.

A further objection made is that the act removes an elected officer, the mayor, from office during the term for which he was elected, by a mere change in the name of the office. The right to grant a new charter to the city, imposing a new form of government, is conceded, even though the effect is to abolish the office and to deprive the officer of his place. But it is argued that the merely nominal abolishing of the office by the substitution of one with the same powers and duties only under a different name is beyond the legislative power. It does not appear how this conclusion follows. There is no right to a public

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office unless it is under the express protection of the constitution (*Lloyd v. Smith*, 176 Pa. 218), and such protection is nowhere given to municipal officers. On the contrary the universal rule is that, unless otherwise directed by the new act, the officers go out with the charter under which they held, and the officers under the new charter take their places whether under the same or a different name. Merely official positions, unprotected by any special constitutional provisions are subject to the exercise of the power of revision and repeal by the legislature. *Kilgore v. Magee*, 85 Pa. 401. "The argument is that the act is unconstitutional because it transfers the duties and emoluments of the office of district attorney to another. . . . The office of district attorney is not one of those which are usually denominated constitutional. . . . Not having been mentioned by the constitution the legislature was left with unrestricted power to prescribe what the duties of the office should be, what the length of its tenure, what its emoluments and how it should be filled. Having the power to create, they have also the power to regulate and even destroy. Undoubtedly the legislature may at any moment repeal the act of 1850 and abolish the office. They may provide a substitute for it." *Strong, J., Com. v. McCombs*, 56 Pa. 436. "As this decision will deprive the respondent of a portion of the term of his office, some question arises as to the power of the legislature to enact a law having such an effect. But this is fully met by the decision of this court in the case of *Commonwealth v. McComb*, 56 Pa. 436. We there held as to offices which are legislative only and not constitutional, the power which created them may abolish or change them at pleasure without impinging upon any constitutional right of the possessor of the office, and without violating any duty of the legislative body." *Com. ex rel. v. Weir*, 165 Pa. 284.

It being conceded that the legislature may abolish municipal offices by a change of the charter, the question how great or how small the changes by the new charter shall be, and to what particulars they shall apply, is one wholly for legislative consideration. In the act under discussion the changes in the general scheme of government are many and important. With respect to the offices of mayor and recorder, each being the chief executive of a city, a similarity in their powers and duties is natural if not essential, but the offices are not identical either in substance or in name. The recorder has far greater executive powers than his predecessor the mayor, and yet lacks some of the other powers that the latter had. The very argument of the appellants first noticed, on the impossibility of execution of the act, was based on the recorder's want of the authority in the passage of ordinances which the mayor had, and which it was contended was essential to the operation of the new system.

The public interest of the questions involved, though not always their difficulty, has led us to discuss thus in detail the specific objections to the act that the learning and ingenuity of eminent counsel have

been able to suggest. There remains one which is based upon broader and more far-reaching considerations than the others, though like most of them it is directed against the schedule. Indeed, the objections to this act may be summed up in the classic phrase in *cauda venenum est*. It is urged that it violates the spirit of the constitution in those provisions and that general intent which preserves to the people the right of local self-government.

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The objection is serious, and there can be no denial that some of the provisions of the schedule infringe upon what the citizens generally are accustomed to regard as their political rights. But our view must be confined closely and exclusively to the constitution.

It may be admitted that even an act of the legislature can so far violate the spirit of the constitution as to be void, though not transgressing the letter of any specific provision. But such violation is exceptional and must be made to appear beyond all doubt. Such, for example, is the illustration given by Chief Justice THOMPSON in *Page v. Allen*, 58 Pa. 338, 346: "To illustrate this idea, the executive power of the state under the constitution is lodged in a governor. It would be manifestly repugnant to these provisions of the constitution if an act of assembly should provide for the election of two executives at the same election, yet it would be unconstitutional only by implication, there being no express prohibition on the subject." *Prima facie*, the legislative authority is absolute except where expressly limited. This is the uniform principle of all political and legal views, and of all constructions recognized by constitutional law.

Legis. auth.

"To me it is as plain that the general assembly may exercise all powers which are properly legislative and which are not taken away by our own or by the federal constitution, as it is that the people have all the rights which are expressly reserved. We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, to interpolate into it whatever, in our opinion, ought to have been put there by its framers." BLACK, C. J., *Sharpless v. Mayor of Phila.*, 21 Pa. 147, 161.

etc.
as per page 111

"However easy it may be to demonstrate that public debts (subscriptions to railroad and other enterprises) ought not to be created for the benefit of private corporations, and that such a system of making improvements is impolitic, dangerous, and contrary to the principles of a sound public morality, we can find nothing in the constitution on which we can rest our consciences in saying that it is forbidden by that instrument." BLACK, C. J., *Moers v. City of Reading*, 21 Pa. 188, 200.

"To justify a court in pronouncing an act of the legislature uncon-

stitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to be resolved in favor of the constitutionality of the act." SHARSWOOD, C. J., in *Com. ex rel. v. Butler*, 99 Pa. 535.

"In creating a legislative department, and conferring upon it the legislative power, the people must be understood to have conferred the full and complete authority as it rests in and may be exercised by the sovereign power of any state, subject only to such restrictions as they have seen fit to impose and to the limitations which are contained in the constitution of the United States. The legislative department is not made a special agency for the exercise of specially defined legislative powers, but is entrusted with the general authority to make laws at discretion." STERRETT, J., in *Powell v. Com.*, 114 Pa. 265, 293.

"Whatever the people have not, by their constitution, restrained themselves from doing, they, through their representatives in the legislature may do. This latter body represents their will just as completely as a constitutional convention in all matters left open by the written constitution. Certain grants of power, very specifically set forth, were made by the States to the United States, and these cannot be revoked or disregarded by state legislatures. Then come the specific restraints imposed by our own constitution upon our own legislature. These must be respected. But, in that wide domain not included in either of these boundaries, the right of the people, through the legislature, to enact such laws as they choose, is absolute. Of the use the people may make of this unrestrained power, it is not the business of the court to inquire." DEAN, J., *Com. ex rel. v. Reeder*, 171 Pa. 505, 513.

"Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the constitution, but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the constitution which is not even mentioned in the instrument." Cooley, *Constitutional Limitations*, ch. VII, sec. VI.

"It is also a maxim of republican government that local concerns shall be managed in the local districts, which shall choose their own administrative and police officers, and establish for themselves police regulations, but this maxim is subject to such exceptions as the legislative power of the state shall see fit to make, and when made, it must be presumed that the public interest, convenience and protection are subserved thereby. The state may interfere to establish new regulations against the will of the local constituency, and if it shall think proper in any case to assume to itself those powers of local police which should be executed by the people immediately concerned, we must suppose it has been done because the local administration has proved imperfect and inefficient, and a regard to the general well-being has demanded a change." Cooley, *Constitutional Limitations*, ch. VII, sec. V.

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These citations might easily be multiplied, but I have not thought it necessary to lengthen this opinion by going outside of the text books of recognized authority, and our own decisions. These establish beyond question the general rules of constitutional law, and show that nowhere have they been more more uniformly and strongly enforced than in Pennsylvania. Some of the cases arose before the adoption of the present constitution, but this does not affect the principles of the decisions even though some of the actual questions might now be decided differently under the provisions of the present constitution, for when the constitution has once expressly spoken, all further debate is at an end. The present constitution, as has been said more than once by this court, displays a strong intent to limit the power of the legislature with reference to interference in local affairs. As said by our Brother DEAN in *Perkins v. Philadelphia*, 156 Pa. 554 (565): "Assuming what was the settled law, that the general assembly had all legislative power not expressly withheld from it in the organic law, they (the convention) set about embodying in that law prohibitions which should in the future effectually prevent the evils the people complained of. Article 3 is almost wholly prohibitory; it enjoins very few duties, but the 'thou shalt not's' number more than sixty." This incontrovertible evidence that the constitution is the result of a full, detailed, exhaustive consideration of the subject of legislative control over merely local affairs, is of itself a conclusive argument against any further additions by the courts to its sixty and more expressed prohibitions. There is no sounder or better settled maxim in the law than *expressio unius exclusio est alterius*, and when the authorities which have the right to control any subject, be they only parties to a private contract, or the sovereign people in the adoption of their constitution, have fully considered and determined what shall be the rights, the powers, the duties or the limitations under the instrument, there is no longer any room for courts to introduce either new powers or new limitations. To do so would, in the language of Chief Justice BLACK already quoted, "be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, to interpolate into it whatever in our opinion ought to have been put there by its framers."

The most earnest consideration of the objections to the act of 1901 has convinced us that they are not such as authorize the courts to declare the act void for conflict with the constitution, but must be addressed only to the legislators and their constituencies.

Judgment affirmed.

McCOLLUM, C. J., and DEAN and MESTREZAT, J. J. dissented.

ARNETT v. STATE *EX REL.* DONOHUE

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1907. 168 Ind. 180.

GILLET, J.¹ . . . It is argued that the act of 1897 is invalid because it places the burden of supporting the police system upon the municipality, without giving it any control over the expenditures therefor. The case of *City of Evansville v. State ex rel.* (1889), 118 Ind. 426, 4 L. R. A. 93, is cited in support of this contention. In that case, however, the fact was that the legislature had provided for the creation of a single board, to which it attempted to give the control of the city's police and fire departments, and the act, taken as a whole, was adjudged invalid, as an unwarranted interference with the right of local self-government. The statute before us is quite different in principle, since it has relation only to the department of police. The maintenance of peace and quiet and the suppression of crime and immorality are matters of general interest, and to the attainment of these ends the cities and towns are largely subject to legislative control. As the commonwealth is a unit in respect to its interest in such matters, the regulation thereof is a proper subject of legislation, and whether cities and towns in respect to these matters shall have a centralized or de-centralized form of government is a political question with which the courts have nothing to do. Matters of general interest are not necessarily required to be submitted to the judgment and discretion of the people of the locality. So far as principle is concerned, it is no objection that the State, while imposing upon cities and towns the burden of supporting their police organizations, designates its own agencies to make its plan efficient. The essential elements of what is known as the metropolitan police system in the government of municipalities have been so often vindicated as against constitutional objections that the questions should now be considered at rest. *State ex rel. v. Kolsem* (1892), 130 Ind. 434, 14 L. R. A. 566; *State ex rel. v. Fox* (1902), 158 Ind. 126, 56 L. R. A. 893; *People v. Draper* (1857), 15 N. Y. 532; *People v. Shepard* (1867), 36 N. Y. 285; *People v. Mahaney* (1865), 13 Mich. 481; *People v. Common Council, etc.* (1873), 28 Mich. 228, 15 Am. Rep. 202; *Gooch v. Exeter* (1900), 70 N. H. 413, 48 Atl. 1100, 85 Am. St. 637; *Mayor, etc. v. State* (1859), 15 Md. 376, 74 Am. Dec. 572; *Commonwealth v. Plaisted* (1889), 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. 556; *State v. Covington* (1876), 29 Ohio St. 102; *Police Com. v. City of Louisville* (1868), 3 Bush (Ky.), 597; *State ex rel. v. St. Louis County Court* (1864), 34 Mo. 546; *State v. Hunter* (1888), 38 Kan. 578,

¹ Part of the opinion is omitted. — Ed.

17 Pac. 177; *State ex rel. v. Seavey* (1887), 22 Neb. 454, 35 N. W. 228; 2 Cooley, *Taxation* (3d ed.), 1295, 1296; 1 Dillon, *Mun. Corp.* (4th ed.), § 60; 2 Smith, *Mun. Corp.*, § 1878.¹

STATE EX REL. ST. LOUIS POLICE COMMISSIONERS v. ST.
LOUIS COUNTY COURT.

27

1864. 84 Mo. 546.

BATES, J.² The General Assembly, by an act approved March 27, 1861, "established within and for the city of St. Louis, a board of police, to be called the Police Commissioners of the city of St. Louis."

This board was charged with the duties within the city of St. Louis, to preserve the public peace, prevent crime and arrest offenders; protect the rights of persons and property; guard the public health; preserve order at every public election and all public meetings and places, and on all public occasions; prevent and remove nuisances in all streets, highways, waters and other places; provide a proper police force at every fire for the protection of firemen and property; protect emigrants and travellers at steamboat landings and railway stations; see that all laws relating to elections and to the observance of Sunday, and regulating pawnbrokers, gamblers, intemperance, lotteries and lottery policies, vagrants, disorderly persons, slaves and free negroes, and the public health, are enforced; and also all laws and ordinances of the city of St. Louis which may be properly enforceable by a police force.

To enable the board to perform these duties it was authorized to employ a permanent police force, the officers of which were designated by the act, and the pay of officers and ordinary policemen fixed by it. The board was authorized to provide such office and furniture and such clerks and subordinates as it might need, and to have and use a common seal, and to provide station houses and requisites for the same. It was also authorized in extraordinary emergencies to raise

¹ "The several towns and cities are agencies of government largely under the control of the Legislature. The powers and duties of all the towns and cities, except so far as they are specifically provided for in the Constitution, are created and defined by the Legislature, and we have no doubt that it has the right in its discretion to change the powers and duties in officers appointed by the Governor, if in its judgment the public good requires this, instead of leaving such officers to be elected by the people or appointed by the municipal authorities." *MORTON, C. J. in Com. v. Plaisted*, 148 Mass. 375, 386. See *Eckerson v. Des Moines*, 137, Ia. 452; *Rathbone v. Wirth*, 160 N. Y. 469; *Ex parte Lewis*, 45 Tex. Cr. 1.

² Arguments omitted. — Ed.

such additional force as the exigency may demand for the preservation of the public peace and quiet, and to require the sheriff of the county of St. Louis to act under their control, and, if ordered by them to do so, to summon the *posse comitatus*, and employ such *posse* subject to their direction. They were also authorized to call to their aid any military force, lawfully organized in the city, and they were authorized to make arrests in any part of the State. The city of St. Louis was deprived of all control over the police. The commissioners were authorized to make requisitions upon the city of St. Louis, from time to time, for such sums of money as they might deem necessary for executing their duties, which the city was required to pay.

city deprived of all control but had to pay expenses.

The General Assembly by another act, approved December 12, 1863, increased the pay of the policemen, and also provided for an increase of their number. This act also required the city of St. Louis to pay the requisitions of the commissioners for the additional expense and limited the whole amount of appropriations for police purposes to \$175,000.

The General Assembly by another act, approved February 5, 1864, enacted as follows:

County made

"Sec. 3. The county of St. Louis shall be chargeable with one-fourth of the whole expense of the police force of said city of St. Louis for the year 1864, and for each year thereafter; and the County Court of said county shall from time to time appropriate money out of the county treasury to meet that proportion of said expense; and whenever the said Board of Police Commissioners shall need money to meet the expenses of said police force, they shall make requisition upon said county, for one-fourth, and upon said city for three-fourths thereof."

On the 18th day of February, 1864, the Police Commissioners made a requisition upon the county of St. Louis for seven thousand dollars, for one-fourth of the said police expenses for the months of January and February, in the year 1864, which the County Court refused to allow or to make any appropriation for. The Police Commissioners then applied to this court for a *mandamus*, commanding said County Court to pay said sum and make an appropriation therefor. A conditional *mandamus* having issued, the County Court made return to it, that

1. The act of February 5, 1864, is in violation of common right and of the Constitution of the State, in that it appropriates private property without just compensation; that it is retrospective in its operation, and that it violates the principles of taxation as laid down in the Constitution.

2. There is no money in the county treasury that can legally be appropriated to pay the same, the money in the treasury having been raised by taxation prior to the passage of said act and for certain specific purposes set forth in the order for the assessment and levy of

raised

the taxes from which such funds were derived, and cannot be diverted from the purpose for which they were collected; that it would be necessary to levy a special tax to pay said police force, and no such special tax can be levied without first making application to the General Assembly for permission to do so.

3. The sum of money required is sought to be recovered and applied for the purpose of paying a debt already incurred by said Police Commissioners or the city of St. Louis prior to the passage of said act, and in so far said act is retrospective in its nature, and is inoperative and void.

4. It is not stated or shown to this court what the expense of said police force has been or will be for the year 1864, or that the city of St. Louis has made the appropriations contemplated by said act.

5. The expense of said police for the months of January and February, 1864, had already been paid in the manner provided by law at the time of the passage of said act, and of the issuing of said writ.

I. In respect to the first cause assigned, why a peremptory *mandamus* should not issue, that is, that the act of February 5 is repugnant to the Constitution, — it is said to violate the Constitution in three respects, which will be examined in the order in which they are stated. The first is, that it is an appropriation of private property without just compensation. I remark in the first place that the act does not designate any particular fund (described by the source of its derivation or otherwise) which is made chargeable with this expense. It says that the county of St. Louis shall be chargeable with one-fourth of the expense of the police force of the city of St. Louis, and that the County Court shall appropriate money to pay it. It is therefore immaterial, in considering of the constitutional authority of the General Assembly to pass the act in question, to inquire how the county has acquired or may acquire the money necessary to make the payments required by the act. The money belongs to the county by virtue of acts of the General Assembly, and is expended under the direction of the same authority. Counties are subdivisions of the State, in which some of the powers of the State Government are exercised by local functionaries for local purposes, in this instance and generally the functionary being the County Court. The funds of the county are not strictly private property. They certainly do not belong to the citizens who may have contributed them. They are rather public property, the property of the State acquired from the people and the property in the county, and to be used and expended for the benefit of the same people and property. The General Assembly, having the legislative power of the State, determines to what local uses the county funds shall be applied. Its determination and direction may operate unwisely, harshly and unjustly, but that is no argument against its power to direct. It authorizes and causes the funds to be collected, and requires their expenditure for purposes which it determines to be

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review as to
of local interest and benefit, and its determination is final. The judiciary cannot review this determination of the legislative power; cannot inquire whether the Legislature, in directing an expenditure of county funds, judged correctly or not as to its being for the accomplishment of an object of interest or advantage to the inhabitants of the county. In the present case the Legislature has thought proper to direct that the county of St. Louis shall pay one-fourth of the expenses of a police in the city of St. Louis, which is wholly within and forms a part of the county of St. Louis. This court cannot say that this is not a legitimate use of county funds, or that it is a taking or application of private property to public use without just compensation, and it certainly is not an application of property to private use, for the police commissioners are an agency of the State Government, and required to perform within a specified locality some of the most important duties of the government.

to be retrospective
2d. The act is said to be retrospective in its operation, in that it requires the county to pay a proportion of the expense of the police force for the whole year 1864, when a portion of that year had elapsed at the time the act was passed, February 5. No vested right is taken away or impaired by the act, nor does it impair the obligation of any contract. It simply directs the application to a particular purpose of funds collected by the authority of the Legislature, and over which the Legislature could exercise a power to direct their application within certain limits, which include the object for this act. The previous acts of the Legislature which provided the objects for which county funds could be expended, were at all times subject to repeal or alteration, so as to appropriate the funds in a manner, or to objects different from those before provided. No rights had been vested under the previous acts which can be disturbed by this act. This act is not retrospective in its operation.

3d. The act does not violate the principles of taxation as laid down in the Constitution. This point is fully covered by the decision of this court in the case of Hamilton and Treat against the St. Louis County Court, 15 Mo. 8, which case is also of authority upon the other points decided. The case of Wells v. The City of Weston, 22 Mo. 384, merely decides that the General Assembly cannot authorize a municipal corporation to tax for its own local purposes lands lying beyond the limits of the corporation, and does not conflict with this case.

II. As to the second cause shown in the return, it is understood to mean, not that there is in fact no money in the treasury to pay this requisition, but that as a matter of law all the money which is in the treasury was collected for specific purposes from which they cannot be diverted. The specific purposes for which the money was collected were those heretofore directed by the Legislature, and this act being a later expression of the will of the Legislature controls the subject, and, so far as it conflicts with previous acts, repeals them.

No vested rt as to taxation

how city of St. Louis is that part of the county?

The county is not a private corporation, but an agency of the State Government, and though as a public corporation it holds property, such holding is subject to a large extent to the will of the Legislature. Whilst the Legislature cannot take away from a county its property, it has full power to direct the mode in which the property shall be used for the benefit of the county. op. const
pre

III. The third cause assigned is included in the previous allegation, that the act is retrospective in its operation.

IV. As to the fourth cause assigned, the act does not require that the commissioners shall show to the county at any one time what is, or will be the whole expense for a year, but only that the county shall from time to time make appropriations to pay the requisitions of the commissioners, thus showing an expectation that the requisitions will be made at several different times. Nor does the county's liability at all depend upon the fact, that the city has or has not paid its liability.

V. The fifth cause is based upon the same idea as the third, and has been considered as it was presented in the first.

No good cause having been shown why the county should not pay the requisition of the Police Commissioners, let the peremptory *mandamus* issue.

Judges BAY and DRYDEN concur.

STATE OF WISCONSIN, EX REL. BOARD OF EDUCATION
OF THE CITY OF OSHKOSH v. HABEN. 28

1868. 22 *Wisconsin*, 660.¹

APPEAL from the Circuit Court.

Alternative *mandamus* to require the city treasurer of Oshkosh to pay orders drawn by the board of education in favor of Alger, a contractor on the high school building. By an act passed in 1866, the board were authorized to raise, by special tax, money for the erection of a high school building; and were also authorized, if in their judgment it was necessary, to appropriate the money so raised to the purpose of establishing a state normal school in said city. The said act further empowered the board to raise, by special tax, money for the establishment of a state normal school. Under a resolution of the board, money was raised by taxation for a high school building, and was paid over to the city treasurer. The board did not set apart any of this money for a normal school, nor did they raise any money by taxation for a normal school. In 1867, an act was passed providing,

¹ Statement abridged. Arguments omitted. — Ed.

in substance, that \$10,000 of the money raised by the said tax in 1866 shall be retained in the city treasury, and that the purchase money for the site selected for a normal school in said city shall be paid out of said \$10,000 when the title of said site shall be approved by the regents of the normal schools.

Motion to quash the writ of *mandamus*. Motion denied. Defendant appealed.

Jackson & Halsey, for appellant.

Freeman & Hancock, for relators.

DIXON, C. J. This case presents two questions, which may be stated thus: 1. Was the defendant justified in refusing payment of the orders set forth in the alternative writ? 2. If he was not, are the relators the proper parties to apply to the court for a writ of *mandamus* to compel him to pay them?

The answer to the first question depends on the validity of so much of section 1, chap. 848, Private and Local Laws of 1867, as sets apart and retains in the treasury of the city of Oshkosh, or attempts so to do, the sum of ten thousand dollars out of the tax levied in the year 1866 under the authority conferred by chapter 236, Private and Local Laws of 1866, entitled "An act to authorize the board of education of the city of Oshkosh to levy a tax to build a school-house," which said sum of ten thousand dollars, so to be set apart and retained, was to be paid out as the purchase money for the site for a normal school in said city, to be selected and the title approved and accepted by the board of regents of normal schools. The tax levied in the year 1866, of which this sum of ten thousand dollars was a portion, was, in the words of the act by which it was authorized, levied "to be used for the purpose of erecting a suitable high school building in said city." It was lawfully so levied. It is true that the board of education of the city of Oshkosh, under whose direction the levy was made, were authorized to raise a portion of the sum or sums specified in the 6th section of the act "for the purpose of aiding in the establishment of a state normal school in said city." This authority was, however, purely discretionary; and as the board of education saw fit not to raise any money for that purpose, the inquiry is the same as if no such authority had been conferred. The question then is: Was it competent for the legislature, without the assent of the city or its inhabitants, thus to divert the funds raised and in the hands of the treasurer for the purpose of erecting a suitable high school building, and to declare that they should be appropriated, not for that purpose, but for the purpose of purchasing the site for a state normal school in the city? We are clearly of opinion that it was not. It is well settled as to all matters pertaining to vested rights of property, whether real or personal, and to the obligation of contracts, that municipal corporations are as much within the protection of the federal constitution as private individuals are. The legislature cannot divest a municipal corporation of its property, without the consent of

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its inhabitants, nor impair the obligation of a contract entered into with or in behalf of such corporation. See *Milwaukee v. Milwaukee*, 12 Wis., 93, and authorities cited. What was the act in question but a most obvious attempt, at the mere will of the legislature, to deprive the city of Oshkosh of so much money lawfully acquired for a proper municipal purpose, and, without the assent of the inhabitants, to apply it to another purpose, not municipal, but one in which all the people of the state have a common interest? Clearly no other effect can be given to it. A state normal school, as its name indicates, is a state institution established for the benefit of the people of the entire state and maintained by funds provided by the state. This will readily appear from an examination of the several statutes under which those schools are organized, and which prescribe the powers and duties of the board of regents of the same. R. S. ch. 22; Laws of 1859, ch. 94; Laws of 1865, ch. 537; Laws of 1866, ch. 116. The regents are appointed by the governor by and with the approval of the senate, and the title of the lands, buildings, furniture, books, apparatus and all other property and effects, is vested in the board, which has the exclusive management and control of the same. To say, therefore, that the legislature can, without the assent of the proper municipal authorities or of the inhabitants, take the money of the city of Oshkosh and appropriate it to the establishment of a state normal school, is to say that it can take the money of any municipal corporation and apply it to any general state purpose. If the act had directed the money in question to be deposited in the state treasury as part of the general fund belonging to the state, or had appropriated it toward the completion of the state capital now in process of construction, the violent nature of the proceeding might have been more manifest, but it would not have been more unauthorized. The advantages incidentally accruing to the citizens of Oshkosh from the establishment of a state normal school at that place, though sufficient, with the consent of the legislature, to justify the citizens themselves, or the proper municipal officers, in levying a tax to aid in the purchase of a site or the erection of buildings, do not change the nature of the question here presented. The tax so levied must be with the assent of the citizens or proper city officers. The legislature has no power arbitrarily to impose such a tax, as that would not only be in plain conflict with the rule of uniformity in taxation prescribed by the constitution, but contrary to the general principles of law governing such proceedings. If, therefore, the legislature cannot impose a tax for such a purpose, it follows that it cannot for the same purpose arbitrarily appropriate the money of the city already lawfully raised by taxation for another. As well might the legislature, without the assent of the city, appropriate the high school building itself, after its completion, for a state normal school, as seize the funds provided by the city for the purpose of erecting it. This, we think, would be regarded by every one as wholly unjustified by any sound principle of

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legislation—a mere act of lawless violence. The act in question, though the injustice of it may not be quite so apparent, in reality stands on no better foundation.

2. Are the relators the proper parties to apply for this writ? We think not.

[On the latter ground the order below was reversed.]

may auth. suit by city for damages caused by mob, city.
DARLINGTON v. MAYOR & C. OF NEW YORK. 29

1865. 31 New York, 164.¹

It provides
Surr, in the Superior Court, under the statute of April 13, 1855 (Chapter 428), which provides that, whenever any property shall be destroyed or injured in consequence of any mob or riot, the city or county in which such property was situated shall be liable to an action by the owner for the damages so sustained. The statute further provides that, whenever any final judgment shall be recovered against any such city or county, the treasurer of said city or county shall, upon the production of a certified copy of the judgment roll, pay the amount of such judgment, and charge the amount thus paid to said city or county. *On the trial*, defendants admitted the destruction of plaintiff's personal property, by a riotous assemblage, on July 13, 1863.

Defendants moved for a nonsuit; one ground of the motion being, that the effect of the statute was to deprive the defendants of their property without due process of law. The court nonsuited the plaintiff. The General Term made an order reversing the judgment of nonsuit and directing a new trial. From this order, the defendants appealed.

John K. Hackett and Wm. Fullerton, for defendants.

Thomas Darlington, plaintiff, in person.

Cephas Brainerd and James S. Stearns, of counsel for nine hundred and fifty plaintiffs in like cases.

Qu. - whether prop. of taken
DENIO, C. J. [After deciding another point.] The other objection is that by force of the act, if it shall be executed, what is termed the private property of the city may be taken for a public use without due process of law, and without a provision for compensation. *It cannot be doubted but that* the general purposes of the law are within the scope of legislative authority. The legislature have plenary power in respect to all subjects of civil government, which they are not prohibited from exercising by the Constitution of the United States, or by some provision or arrangement of the Constitution of this State. This act proposes to subject the people of the several local divisions of the State, consisting of counties and cities, to the payment of any damages to property in consequence of any riot or mob within the county or city.

¹ Statement rewritten. Arguments omitted; also the dissenting opinion of INGRAHAM, J., and portions of the opinion of DENIO, C. J. — Ed.

The policy on which the act is framed, may be supposed to be, to make good, at the public expense, the losses of those who may be so unfortunate, as without their own fault to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent; and further, and principally we may suppose, to make it the interest of every person liable to contribute to the public expenses to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to attain them that governments are instituted; and the means provided by this act seem to be reasonably adapted to the purposes in view. If this were less obvious, the practice of the country from which we derive so many of our legal institutions would leave no doubt on the subject. Laws of this general character have existed in England from the earliest period. It was one of the institutions of Canute the Dane, which was recognized by the Saxon laws, that when any person was killed, and the slayer had escaped, the ville should pay forty marks for his death; and if it could not be raised in the ville, then the hundred should pay it. "This irregular provision," says an able author, "it was thought would engage every one in the prevention and prosecution of such secret offenses." (1 Reeve's History of Eng. Law, 17.) Coming down to the reign of the Norman kings, we find in the statute of Winchester (18th ed., I, ch. 1, p. 1) a provision touching the crimes of robbery, murder and arson — that if the country, i. e., the jury, would not answer for the bodies of the offenders, the people dwelling in the county were to be answerable for the robberies, and the damages sustained, so that the whole hundred where the robbery was committed, with the franchises thereof, should be answerable. It is upon this statute that the action against the hundred, for robberies committed therein, of which so many notices are met with in the old books, is grounded. (Reeve, vol. I, p. 213; Second Ins., ch. 17, p. 569.)

Passing by the statutes of subsequent reigns, and particularly several in that of Elizabeth, in which this remedy has been somewhat modified while its principle is steadily adhered to, we come to the 7th and 8th Geo. IV, ch. 81, which was an act for consolidating and amending the laws of England, relative to remedies against the hundred. It repeals several prior acts providing remedies against the hundred for the damages occasioned by persons violently and tumultuously assembled, and enacts a series of provisions very similar in effect with, and in some respects more extensive in their scope than those of the statute under consideration. As the hundreds were not corporations, the action was to be brought against the high constable; and on judgment being rendered, the sheriff was to draw his warrant on the county treasurer for the amount of the recovery. Ultimately, the money was to be collected by local taxation in the hundred made liable. These provisions have no direct bearing upon the present case, but are re-

Policy fact

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ferred to to show that the action in question is based upon a policy which is coeval with the laws of England, and one which has been constantly acted on in that country, and hence that it very clearly falls within the general powers of the legislature.

As, however, the objection of the defendants arises out of a constitutional restraint, substantially identical with one of the provisions of *Magna Charta* (ch. 29), it is at least a curious coincidence, that the policy of compelling a local community to answer with their property for acts of violence committed by others, has been considered by the English parliament as a supplement to, rather than a violation of, the Great Charter.

In the statute called *Articuli super cartam*, Anno 28 Edward I, which confirmed the Great Charter and the Charter of the Forest, and directed that the same should be firmly observed "in every part and article," it was directed in terms that the statute of Winchester, which gave a remedy against the hundred, for robberies committed in it, should be sent again into every county to be read and published four times a year, and kept in "every point as strictly as the two Great Charters, upon the pains therein limited." (Reeve, vol. II, p. 340; Coke, 2 Inst., ch. 17, p. 369.)

Assuming it to be sufficiently apparent that the statute in question falls within the general scope of legislative authority, the particular inquiry is, whether it violates the constitutional provisions relied on by the defendant. It is plain enough that the suits which it authorizes, will, if successful, result in requiring contributions from the tax-payers of the local communities, to make good the losses of persons who have suffered from the acts of rioters. In that way, it may be said that their property may be taken. In one sense it may be conceded that it is taken for a public use; for when the State undertakes to indemnify the sufferers from riots, the executing of that duty is a public concern, and the expenditure is on public account. It is a public use in the same sense as the expenditure of money for the erection of court houses and jails, the construction of roads and bridges, and the support of the poor. It is taken for an object which the legislature has determined to be of public importance, and for the interest of the State. Private property thus taken is not seized by the execution of the right of eminent domain.

If it were so considered, all contributions exacted from citizens for defraying the expenses of the government and of local administration, would, in order to be legal, require the return of a precise equivalent to the tax payers as a compensation, which would be absurd. Every one will at once see that this cannot be so, and that if it were, government could not be carried on at all. But no general reasoning is necessary, for the subject has been elaborately considered and determined in this court.

There can be no objection to imposing the burthens which shall

arise in the execution of the act, upon the local division where the riots take place, and the losses were occasioned. This is the case with all public exactions, which from their nature are local in their objects, and which generally arrange themselves under the head of town, city or county charges. If we look at the statute we are examining, as resulting ultimately in occasioning taxation, for the means of raising the money which will be required to carry out its purposes, the foregoing observations will be all which it seems to me necessary for the determination of this appeal; and I am of opinion that it should be considered in that light.

But it is contended that the application of the case to the city of New York, raises a further and different question. The fact that it is governed by a corporation, under a charter conferring certain municipal rights, does not, of course, raise any distinction. The authority of the legislature prevails within the limits of chartered cities and villages, and the public laws have the same force there as in the other parts of the State. That position does not admit of an argument. (*The People v. Morris*, 13 Wend., 325.)

The particular point appears to be that the form of the remedy for raising the money required to pay individual losses, provided by the act, leads to consequences which would violate the constitutional provision. The party who has sustained damages by a riot, may prosecute the city corporation; and the act provides that if he obtain judgment, the city treasurer is to pay the amount and charge it to the city. It is argued that it may happen that there will be no moneys in the treasury, or the treasurer may be unable or unwilling to make the payment; but the plaintiff, having a judgment against the corporation, may cause an execution to be levied upon its property. The property of the city, it is further argued, is private property, which the corporation holds by the same title as an individual or a private corporation, and that it is equally under the protection of the Constitution. The effect of the act, as it is urged, therefore, is the same as though the property of one designated private citizen should be directed to be seized and appropriated to pay a local public charge. This, it is plain, could not be justified under the taxing power or any other head of legislative authority. The answer made to this argument, in the printed opinion of the Superior Court, is, that the method of collecting the judgment by application to the treasurer, is exclusive, and that property cannot be taken on execution upon such judgments. This answer is not entirely satisfactory to my mind. By permitting the party who had sustained damages to recover judgment in the ordinary course of justice, without any provision qualifying the effect of such judgment, it cannot, I think, have been intended to withhold from him any of the legal rights of a judgment creditor. The most universal of these rights is that of levying the amount of the judgment against the property of the debtor, by the usual process of execution. If it were intended to exclude that remedy, it is difficult to see why a judgment should be per-

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mitted to be recovered at all. Without that effect the judgment would be illusory in many cases, for it would rarely, if ever, happen that there would be funds in the treasury adequate and applicable to the payment of such damages where they should be for a considerable amount. My opinion is, that the judgment is of the same force and efficacy as any other judgment which may be rendered against the city, subject, perhaps, to the duty of first presenting it to the treasurer.

It is plain enough that it would not be a judicious administration of the affairs of a city to permit its property to be subjected to a forced sale, on execution; and hence it has become a usual practice to add to the sums included in the annual tax levy any amount for which judgments have been recovered against the corporation, and to authorize the borrowing of money, if necessary, in order to pay such judgments. Instances of such legislation occur in many of the recent statutes. (Laws of 1863, p. 411, § 6; id., 1864, p. 938, § 1, p. 946, § 5.) A municipal corporation, equally with a private corporation, may have its property taken in execution, if payment of a judgment is not otherwise made. I am far from supposing, however, that such estate, real or personal, as may by law, or by authorized acts of the city government, be devoted to public use, such as the public edifices, or their furniture or ornaments, or the public parks or grounds, or such as may be legally pledged for the payment of its debt, can be seized to satisfy a judgment. Such, clearly, cannot be the case, for these structures are public property, devoted to specific public uses, in the same sense as similar subjects in the use of the State government. The argument that I am examining supposes that the city may possess other property, held for purposes of income or for sale, and unconnected with any use for the purposes of the municipal government. Such property, the defendants' counsel insists, and for the purpose of the argument I concede, is subject to be levied on and sold to satisfy a judgment rendered against the city corporation. The true answer to the position that such seizure would be a violation of the constitutional protection of private property is, that it is not private within the sense of that provision. City corporations are emanations of the supreme law making power of the State, and they are established for the more convenient government of the people within their limits. In this respect, corporations chartered by the crown of England, and confirmed at the revolution, stand on the same footing with similar corporations created by the legislature. Their boards of aldermen and councilmen and other officers are as truly public officers as the boards of supervisors, or the sheriffs and clerks of counties; and the property intrusted to their care and management is as essentially public property as that confided to the administration of similar official agencies in counties and towns. In cities, for reasons partly technical, and in part founded upon motives of convenience, the title is vested in the corporate body. It is not thereby shielded from the control of the legislature, as the supreme law making power of the State. Let us suppose the city to be the owner

of a parcel of land not adapted to any municipal use, but valuable only for sale to private persons for building purposes, or the like. No one, I think, can doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds to be devoted to some municipal or other public purpose, within the city, as a court house, a hospital, or the like; and yet, if the argument on behalf of the defendants is sound, it would be the taking of private property for public use without compensation, and the act would be void.

What has been actually done respecting such city property, in the present case, if a judgment for riot damages has the effect which the argument supposes, and which I attribute to it, is to render it liable to sale on execution, to satisfy a liability of the city arising under the riot act; and this has been done under the express authority of the legislature. The vice of the argument of the defendant is, that it assimilates the condition of the city, in respect to the property to which it has title, to that of an individual or a private corporation, and denies to the legislature any power over it which it would not possess over the fortunes of a private citizen.

In respect to its powers, the corporate body is understood to be the trustees of the people represented by the supreme legislative power of the State, but in regard to its property it is argued that there are no beneficiaries. The property, it is insisted, is private, and hence the legislature has no legitimate control over it.

But in what sense can this city property be said to be private? It certainly does not belong to the mayor or any or all of the members of the common council, nor to the common people as individual property. (*Roosevelt v. Draper*, 23 N. Y., 318.) If one of these functionaries should appropriate it or its avails to his own use, it would be the crime of embezzlement, and if one of the people not clothed with official station should do the like, it would be the offense of larceny. Should it be said that like all corporate property, it belongs to the ideal being, the corporation, and that its title is beneficial and not fiduciary, that answer would not avoid the difficulty. Indeed it would not be sound. A corporation, as such, has no human wants to be supplied. It cannot eat or drink, or wear clothing, or live in houses. It is the representative or trustee of somebody, or of some aggregation of persons. We cannot conceive the idea of an aggregate corporation which does not hold its property and franchise for some use, public or private. The corporation of Dartmouth College was held to be the trustee of the donors, or of the youth needing education and moral and intellectual training. The corporation of New York, in my opinion, is the trustee of the inhabitants of that city. The property, in a general and substantial, although not a technical sense, is held in trust for them. They are the people of this State — inhabiting that particular subdivision of its territory — a fluctuating class constantly passing out

of the scope of the trust by removal and death, and as constantly renewed by fresh accretions of population. It was granted for their use and is held for their benefit. The powers of local government committed to the corporation are precisely of the same character. They were granted and have been confirmed and regulated for the good government of the same public, to preserve order and obedience to law, and to ameliorate and improve their condition and subserve their convenience as a community.

There are a few cases which countenance, to a certain extent, the views of the defendants' counsel, which will be briefly noticed. [The learned Judge then commented upon *Bailey v. Mayor of New York*, 3 Hill, 531; *Britton v. The Mayor, &c.*, 21 Howard Practice Rep. 251; *Benson v. The Mayor, &c.*, 10 Barbour, 223; *People v. Hawes*, 37 Barbour, 440; and *Atkins v. Randolph*, 31 Vermont, 226.]

It is unnecessary to say whether the legislative jurisdiction would extend to diverting the city property to other public use than such as concerns the city, or its inhabitants; for this act, if the effect suggested is attributed to the judgment for riot damages, devotes the property which may be seized on execution to legitimate city purposes, namely, to reimbursing those who have suffered damages on account of the inefficiency of the city authorities to protect private property from the aggressions of a mob. I am of opinion that the order appealed from should be affirmed, on the ground that the means provided by the statute to raise money to pay for the damages in question were not hostile to any provision of the Constitution.

INGRAHAM, J., dissented.

STATE EX REL. BULKELEY v. WILLIAMS.

1896. 68 Conn. 131.¹

APPLICATION for a writ of mandamus, to enforce the payment by the Treasurer of the town of Glastonbury of an order drawn upon him by the Commissioners of the Connecticut River Bridge and Highway District, for the proportionate share required of the town, under the Act of June 28, 1895, for the maintenance of the highway under the charge of the said Commissioners.

In 1887 an Act was passed by the legislature for the purpose of making a toll-bridge across the Connecticut river a free public highway and throwing the burden of its support on the towns which would be especially benefited by such a change. Upon proceedings in the Superior Court under the above act, and after notice to the towns, it was, in 1889, judicially determined that certain towns, including Glastonbury, would be specially benefited; and that Glastonbury's proportion of the expense should be $\frac{2}{3}$. After the toll-bridge had thus been converted into a free public highway, the legislature in 1893 enacted that the highway, which included the bridge and its ap

¹ The statement is abridged, and some points in the case are omitted. — Ed.

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proaches, should thereafter be maintained by the State at its expense. Subsequently, while a new bridge was being erected at the expense of the State, the old bridge was accidentally destroyed by fire. Thereafter, on May, 24, 1895, an Act was passed repealing the Act of 1893, and requiring certain towns, including Glastonbury, to maintain in future the highway across the Connecticut river where the old bridge formerly was, with the proper approaches, and to erect a new bridge whenever necessary, and maintain the same, contributing to the expenses in the proportions established by the judgment of 1889. On June 28, 1895, an Act was passed "Creating the Connecticut River Bridge and Highway District." By this Act, Glastonbury and four other towns were constituted a corporation, under the above name, for the construction and maintenance of a free public highway across the Connecticut river at Hartford, as described in the decree of 1889. Four citizens of Hartford and one from each of the other towns were appointed commissioners for said district, with authority to maintain said free public highway; and, whenever public safety or convenience may require, to erect new bridges at the expense of said towns, at a cost not exceeding \$500,000. The board was authorized to issue bonds of the district; and each of the five towns, in order to meet the principal and interest on the bonds and to pay for the ordinary support and maintenance of the highway, was required to contribute in certain proportions; the share of Glastonbury being $\frac{1}{5}$. The orders of the commissioners for the payment of money were made obligatory upon the towns, and the courts were empowered to enforce these orders by mandamus. No part of the aforesaid highway was within the town of Glastonbury.

In the Superior Court, judgment was rendered for the relators and the respondent appealed.

Lewis E. Stanton and John R. Buck, for respondent.¹

Lewis Sperry and George P. McLean, for relators.

BALDWIN, J. . . . The judgment, brought up for review by this appeal, directed the issue of a writ of peremptory mandamus, to enforce the payment by the treasurer of the town of Glastonbury of an order drawn upon him by vote of the Commissioners for the Connecticut River Bridge and Highway District for $\frac{1}{5}$ of the sum of \$500, required to meet expenses incurred by the board for the ordinary support and maintenance of the highway under their charge. In behalf of the town it is contended that it cannot thus be compelled to contribute, at the dictation of officials not of its own choosing, to the cost of maintaining a highway which is wholly outside of its territorial bounds.

It has undoubtedly been the general policy of the State to leave the expense of public improvements for highway purposes to the determination of the municipal corporations within the limits of which

¹ Arguments omitted. — Ed.

the highways may be situated, and to charge them only with such obligations as may be incurred in their behalf by officers of their own selection. But when the State at large or the general public have an interest in the construction or maintenance of such works, there is nothing in our Constitution, or in the principles of natural justice upon which it rests, to prevent the General Assembly from assuming the active direction of affairs by such agents as it may see fit to appoint, and apportioning whatever expenses may be incurred among such municipalities as may be found to be especially benefited, without first stopping to ask their consent. *Norwich v. County Commissioners*, 13 Pick. 60; *Rochester v. Roberts*, 29 N. H. 360; *Philadelphia v. Field*, 55 Pa. St. 320; *Simon v. Northup*, 27 Or. 487, 40 Pac. Rep. 560. As against legislation of this character, American courts generally hold that no plea can be set up of a right of local self-government, implied in the nature of our institutions. *People v. Draper*, 15 N. Y. 532, 543; *People v. Flagg*, 46 N. Y. 401, 404; *Commonwealth v. Plaisted*, 148 Mass. 375, 19 Northeastern Rep. 224.

The Constitution of Connecticut was ordained, as its preamble declares, by the people of Connecticut. It contemplates the existence of towns and counties; and without these the scheme of government, which it established, could not exist. It secured to these territorial subdivisions of the State certain political privileges in perpetuity, and among others the election by each county of its own sheriff, and by each town of its own representatives in the General Assembly, and its own selectmen and such officers of local police as the laws might prescribe. It secured them, because it granted them; not because they previously existed. Towns have no inherent rights. They have always been the mere creatures of the Colony or the State, with such functions and such only as were conceded or recognized by law. *Webster v. Harwinton*, 32 Conn. 131. The State possesses all the powers of sovereignty, except so far as limited by the Constitution of the United States. Its executive and judicial powers are each distributed among different magistrates, elected some for counties, and some for the State at large; but its whole legislative power is vested in the General Assembly. Our Constitution imposes a few, and only a few, restrictions upon its exercise, and except for these the General Assembly, in all matters pertaining to the domain of legislation, is as free and untrammelled as the people would themselves have been, had they retained the law-making power in their own hands, or as they are in adopting such constitutional amendments from time to time as they think fit. *Pratt v. Allen*, 13 Conn. 119, 125; *Booth v. Town of Woodbury*, 32 id. 118, 126. It has not infrequently, from early Colonial days, made special provision for particular highways or bridges, and in several instances by the appointment of agencies of its own to construct or alter them at the expense of those upon whom it thought fit to cast the burden. 1 Col. Rec. 417; 5 id. 80; 13 id. 605, 630; 1 Private Laws, 282, 285.

By legislation of this nature the city of Hartford was recently compelled to contribute a large sum for a separation of grades at the Asylum street railroad crossing, and we held the Act to be not unconstitutional. *Woodruff v. Cutlin*, 54 Conn. 277; *Woodruff v. New York & N. E. R. R. Co.*, 59 id. 63, 83.

That so many laws of this general description have been enacted by the General Assembly, both before and since the adoption of our Constitution, is, of itself, entitled to no small weight in determining whether they fall within the legitimate bounds of what that instrument describes as "legislative power." *Maynard v. Hill*, 125 U. S. 190, 204; *Wheeler's Appeal*, 45 Conn. 306.

One of those to which reference has been made (1 Priv. Laws, p. 285), required the town of Granby to build and maintain a bridge across the Farmington river, half of which was in the town of Windsor, and was adjudged to be valid by this court, notwithstanding then as now the General Statutes provided that bridges over rivers dividing towns should be built and maintained at their joint cost. *Granby v. Thurston*, 23 Conn. 416. There is no principle of free government or rule of natural justice which demands that the support of highways and bridges shall be imposed only on those territorial subdivisions of the State in which they are situated. If it be required of them, it is only by virtue of a statute law, which the legislature can vary or repeal at pleasure. *Chidsey v. Canton*, 17 Conn. 475, 478. The burden is one that the legislature can put on such public agencies as it may deem equitable, and transfer from one to another, from time to time, as it may judge best for the public interest. *Dow v. Wakefield*, 103 Mass. 267; *Agawam v. Hampden*, 130 Mass. 528; *County of Mobile v. Kimball*, 102 U. S. 691, 703; *Washen v. Bullitt County*, 110 U. S. 558.

The defendant urges that taxation and representation are indissolubly connected by the underlying principles of free government, and that this (the commission which directs the affairs of the Bridge District and makes requisitions on the towns for such funds as it deems necessary, not having been selected by them) is a sufficient defense against the payment of the order which has been drawn upon him, since it can be paid only out of moneys raised by town taxation.

Taxes can, indeed, under our system of government, only be imposed by the free consent of those who pay them, or their representatives; and for purposes which they approve. But the inhabitants of these towns were represented in the General Assembly, by which the laws now brought in question were enacted. The legislative power, after defining the general purposes of taxation, to confer upon local public corporations the right to determine the amount of the levy within the territory under their jurisdiction, is unquestionable; and in its exercise it is immaterial whether the corporations, to which that function is entrusted, or between which it is shared, be called counties or towns, school districts or bridge districts. When a levy is voted, the action

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is corporate action, deriving its obligatory force wholly from the authority of the State. Towns cannot tax their inhabitants for any purpose except by virtue of statute law. That law for many years required them annually to tax for moneys to be paid over to the State treasurer for State expenditures. It now requires them to tax, as occasion may require, for moneys to be paid over to the county treasurer for county expenditures. It can equally require any town or towns to tax for moneys to be paid over to the treasurer of a bridge or highway district, in which they are included, for district expenditures. *Kingman et al., Petitioners*, 153 Mass., 566, 27 Northeastern Rep. 778.

It has been suggested that in Colonial times it was the right of the inhabitants of every town, themselves, to order the municipal duties assigned to them and choose the officers by whom only it could be placed under a pecuniary obligation, and that this is one of those rights and privileges "derived from our ancestors," to "define, secure and perpetuate" which our Constitution was adopted, and to which its preamble refers. If it can be said that such a right ever existed, it was not one of the nature of those which were described by the framers of the Constitution. They were speaking of rights personal to the individual, as a citizen of a free commonwealth; civil as distinguished from political; and belonging alike to each man, woman and child among the people of Connecticut. Such of them as they deemed most essential they proceeded to specify in the Declaration of Rights, and here we find asserted (Art. 1, § 2) that "all political power is inherent in the people, and all free governments are founded on their authority" and subject to such alterations in form, from time to time, "as they may think expedient." If there were any absolute right in the inhabitants of our towns to regulate their town finances and affairs which was superior to all legislative control, it would be a great "political power." It would create an *imperium in imperio*, and invest a certain class of our people — those qualified to vote in town meetings — with the prerogative of defeating local improvements which the General Assembly deemed it necessary to construct at the expense of those most benefited by them, under the direction of agents of the State, unless the work were done and its cost determined under town control. No set of men can lay claim to such a privilege under the Constitution of Connecticut.

Nor is it of any importance that in 1893 the State had taken the maintenance of the bridge upon itself. This was merely a gratuitous act, with no element of a contract, and gave rise to no vested rights, except such as might accrue from obligations on the part of the State subsequently assumed by virtue of its provisions.

The defendant also urges that the Act of June 28th violates the XIVth Amendment of the Constitution of the United States, in that it

deprives the town of Glastonbury of property without due process of law, and denies to it the equal protection of the laws. No right, as against a State, to the equal protection of the laws is secured to its municipal corporations by this amendment, which can limit in any way legislation to charge them with public obligations. Nor have their inhabitants, in their capacity of members of such corporations, any greater rights or immunities. *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79, 93. No property of the town of Glastonbury has been or is to be taken. *Booth v. Town of Woodbury*, 32 Conn. 118, 130; *Railroad Company v. County of Otoe*, 16 Wall. 667, 676. A duty to lay taxes for public purposes has been imposed, and for reasons already stated, it was competent to the General Assembly to create that duty, as it was created. Their proceedings were due proceedings: the process by which it is now sought to compel the defendant to pay the sum in controversy is due process. The town can found no claim, under the Constitution of the United States, any more than under that of Connecticut, to such right of local self-government as precludes the General Assembly from exacting this payment, notwithstanding the demand comes from another municipal corporation, the Bridge District, in choosing whose members, or directing whose affairs, it has had no share. *Gionza v. Tiernan*, 148 U. S. 657, 662.

We have spoken of the Bridge District as a municipal corporation, although it may not answer the common law definition of that term, since not composed of the inhabitants of any territory as such. In modern times corporations, both public and private, have often been constituted by a union of other corporations. Such was the United States of America after the Declaration of Independence, and until the adoption of their present Constitution. Such are the various counties of this State, once *quasi* corporations and now full corporations, the constituents of which have always been the several towns within their boundaries. The power of the Bridge District over the towns composing it is no less than it would have been, had their inhabitants individually been made its members. The district and the towns are alike agencies of the State for governmental purposes and, whether they be styled public or municipal corporations, their relations to it and to each other are the same, and equally subject to modification at its pleasure.

The defendant having refused to pay an order lawfully drawn upon him in behalf of the Bridge District, the writ was properly issued against him.

TORRANCE, J., and FENN, J., concurred.

ANDREWS, C. J., delivered a dissenting opinion (68 Conn. p. 157 to p. 177), in which HAMERSLEY, J., concurred.

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PEOPLE ~~EX REL.~~ DUNKIRK, WARREN & PITTSBURGH
RAILROAD v. BATCHELLOR. 31

1873. 53 N. Y. 128.

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of plaintiffs, entered upon an order denying motion for new trial, directing judgment upon a verdict.

Mandamus to compel issuance of bonds under act authorizing to subscribe to stock of R.R.

The proceeding originated on an application by the relator for a mandamus to compel Walker Parkhurst, the predecessor of the defendant, as supervisor of the town of Stockton, in the county of Chautauqua, to issue the bonds of that town, pursuant to the provisions of an act of the legislature of this State, entitled "An act to facilitate the construction of the Dunkirk, Warren and Pittsburgh Railroad, and to authorize towns in the county of Chautauqua to subscribe to the capital stock of said company," passed April 23, 1867, and of the acts amendatory thereof and supplementary thereto.

On the motion for a peremptory *mandamus*, after hearing counsel for the respective parties, the application was denied, but an alternative *mandamus* was directed. This was issued, and the defendant made his return, presenting certain issues. To this the relator replied. The issues thus formed were tried at a Circuit Court.

The facts appearing upon the trial, as far as pertinent to the questions discussed and the statute brought in question, are sufficiently set forth in the opinion.

The jury rendered a verdict for plaintiffs. Exceptions were ordered to be heard at first instance at General Term.

compelled to become stockholder

GROVER, J.¹ . . . This brings us to the question whether a mandatory statute compelling a town or other municipal corporation to become a stockholder in railroad or other corporation by exchanging its bonds for stock upon the terms prescribed by the statute, without its consent in any way given, is constitutional. This is a different question from that decided by this court in *The Bank of Rome v. The Village of Rome*, 18 N. Y. 88, and in subsequent cases. In these the question was, whether enabling statutes conferring power upon such corporations to contract debts with their own consent and investing the money thus raised in the stock of railroad corporations or of exchanging directly its bonds for such stock were valid. These acts were held constitutional by this court, but this does not determine that municipal corporations may be compelled by the mere authority of the legislature to enter into this class of contracts and become such stockholders without their consent and against their will. In *The People v. Flagg*, 46 N. Y. 401, it was held that an act requiring the town of Yonkers without its

¹ Part of the opinion only is given. — Ed.

consent to issue bonds for raising money, which was to be expended in the construction of highways in the town, in the manner prescribed by the act, was constitutional. This was so determined, upon the ground that the making and improving of public highways and providing the means therefor were appropriate subjects of legislation; that towns possess such powers as are conferred by the legislature; that they are a part of the machinery of the State government and perform important municipal functions, subject to the regulation and control of the legislature. In short, that the act was the mere exercise of the unquestioned power of the legislature to determine what highways should be constructed and of the taxing power in providing means to defray the expense incurred in their construction. But it is said in the opinion that if the object of the expenditure was private, or if the money to be raised was directed to be paid to a private corporation, which is authorized to use the improvement for private gain, the question would be quite different, and in this respect there is a limit beyond which legislative power cannot legitimately be exercised. It is manifest that the question presented in the present case was not determined in that, unless it shall be further held that a railroad owned and controlled by a corporation and operated by it for the benefit of its stockholders is a public highway in the same sense as the common roads of the country. The towns through which the latter run may be compelled to construct and keep them in repair for the common use of the public. The substantial question in the present case is whether they may be so compelled to construct and repair railroads owned and operated by corporations for the benefit of the stockholders. It is clear that they may be, if they are public highways in the same sense as common roads. It has been uniformly held that the right of eminent domain may be exercised so far in behalf of a railroad corporation as is necessary for the construction and operation of the road upon the ground that the road and its operations was for a public purpose, and therefore the real estate condemned for its use was taken for public and not private use. But it is equally clear that property acquired by the corporation belongs to it exclusively, and its ownership is as absolute as that of any private individual of property belonging to him. It is also clear that so far as the road is operated for the benefit of its stockholders, the corporation is private. We have then an artificial being, created by the legislature, endowed with public franchises, the absolute owner of property of which it cannot be deprived by legislation except for public purposes, carrying on business for the private emolument of its stockholders. *The People v. Flagg* determines that towns may be compelled to provide for the construction and maintenance of improvements of a public character exclusively. But here we have an attempt to compel them to aid in the construction of a work public in some respects, but private in others, of at least equal importance. It is said that municipal corporations are creatures of the legislature and subject to its control. In a

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certain sense this is true. They are created by the legislature as instrumentalities of the government, and so far as legislation for governmental purposes is concerned are absolutely subject to its control. The powers of legislation over individuals is given to the legislature for all the purposes of government, subject to such restrictions as are contained in the Constitution. Yet no one would claim that an individual could be compelled by a statute to exchange his note or bond and mortgage with a railroad corporation for its stock, against his will, upon such terms as were prescribed in the act or any other. It is within the province of legislation to provide for enforcing the performance of contracts when made; but to enforce the making of them by individuals is entirely beyond it. We have seen that municipal corporations may be compelled to enter into contracts for an exclusive public purpose; but I think they cannot be when the purpose is private. This is equally beyond the province of legislation in the case of such corporations as in those of private corporations or individuals. In *Atkins v. The Town of Randolph*, 31 Vermont, 226, it was held that an act providing for the appointment of an agent of the town by the county commissioner, with power to purchase liquors on the credit of the town, and to sell the same for certain specified purposes, and account for and pay over the proceeds to the town as prescribed, was unconstitutional; and the town, not having consented to the appointment or ratified the contract, was not liable for the liquors purchased upon its credit by such agent pursuant to the act. This judgment is based upon the grounds that the legislative power over municipal corporations is not supreme, and does not include the power of compelling them to enter into contracts of a private character, although such contracts would conduce to the public good by enabling the government to suppress traffic in intoxicating liquors. In the *Western Saving Fund Society of Philadelphia v. The City of Philadelphia*, 31 Penn. 185, it was held that when a municipal corporation engages in things not public in their nature, it acts as a private individual; and in the same case, between the same parties (id. 175), it was held that it so acted in supplying its inhabitants with gas. In *Bailey v. The Mayor, etc.*, 3 Hill, 531, it was held that a municipal corporation was to be regarded as private as to its ownership of lands and other property; and that the test whether powers exercised by a municipal corporation were public or private was whether they were for the benefit and emolument of the corporation or for public purposes; and it was further held that the city of New York, under the act to supply the city with pure and wholesome water (Laws 1834, p. 451) acted as a private corporation and was responsible as such for the acts of those appointed by the act, for the reason that the corporation had accepted of and consented to the act. Surely a town acts as a private corporation in becoming a stockholder of a railroad corporation, and, as such, interested in the operation of the road for the benefit of the stockholders. When a municipal acts as a private

corporation it acts as an individual. In *Taylor v. Porter*, 4 Hill, 140, it was tersely said by BRONSON, J., that the power of making bargains for individuals has not been conferred upon any department of the government. In *The People v. Morris*, 13 Wend. 325, the distinction between the nature of the action of public and private corporations is clearly given.

The judgment appealed from must be reversed and a judgment rendered declaring the relator not entitled to a peremptory writ, and dismissing the proceedings, with costs to the appellant.

CHURCH, Ch. J., ALLEN and PECKHAM, JJ., concur.

FOLGER, J., concurs in result.

ANDREWS, J., dissents; RAPALLO, J., does not vote.

PROPRIETORS OF MOUNT HOPE CEMETERY v. BOSTON. 32

1898. 158 Massachusetts, 509.¹

PETITION for a writ of mandamus to compel the city of Boston to convey Mount Hope Cemetery to the petitioning corporation in accordance with Statute 1889, Chapter 265. Hearing before KNOWLTON, J., who reserved the case for the full court on the petition, answers, and such of his findings as were competent to be considered. The material facts are stated in the opinion.

W. Gaston & J. B. Richardson, (*S. W. Creech, Jr.*, with them,) for petitioners.

T. M. Babson and *S. D. Charles*, for respondents.

ALLEN, J. Over property which a city or town has acquired and holds exclusively for purposes deemed strictly public, that is, which the city or town holds merely as an agency of the State government for the performance of the strictly public duties devolved upon it, the Legislature may exercise a control to the extent of requiring the city or town, without receiving compensation therefor, to transfer such property to some other agency of the government appointed to perform similar duties, and to be used for similar purposes, or perhaps for other purposes strictly public in their character. Thus much is admitted on behalf of the city, and the doctrine is stated and illustrated in many decisions. *Weymouth & Braintree Fire District v. County Commissioners*, 108 Mass. 142. *Whitney v. Stow*, 111 Mass. 368. *Rawson v. Spencer*, 113 Mass. 40. *Stone v. Charlestown*, 114 Mass. 214. *Kingman, petitioner*, 153 Mass. 566, 573. *Meriwether v. Garrett*, 102 U. S. 472. *Mayor, &c. of Baltimore v. State*, 15 Md. 376.

Public prop.

By a quite general concurrence of opinion, however, this legisla-

¹ Statement abridged. Part of opinion omitted. — Ed.

tive power of control is not universal, and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain with payment of compensation. This distinction we deem to be well founded, but no exact or full enumeration can be made of the kinds of property which will fall within it, because in different States similar kinds of property may be held under different laws and with different duties and obligations, so that a kind of property might in one State be held strictly for public uses, while in another State it might not be. But the general doctrine that cities and towns may have a private ownership of property which cannot be wholly controlled by the State government, though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen. *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 115. *Mount Pleasant v. Beckwith*, 100 U. S. 514, 533. *Railroad Co. v. Ellerman*, 105 U. S. 166, 172. *Cannon v. New Orleans*, 20 Wall. 577. *Mayor, &c. of New York v. Second Avenue Railroad*, 32 N. Y. 261. *People v. Batchellor*, 58 N. Y. 128. *People v. O'Brien*, 111 N. Y. 1, 42. *Webb v. Mayor, &c. of New York*, 64 How. Pr. 10. *Montpelier v. East Montpelier*, 29 Vt. 12. *Western Saving Fund Society v. Philadelphia*, 31 Penn. St. 175. *People v. Detroit*, 28 Mich. 228, 235, 236, 238. *People v. Hurlbut*, 24 Mich. 44. *Detroit v. Detroit & Howell Plank Road*, 48 Mich. 140. *Thompson v. Moran*, 44 Mich. 602. *Louisville v. University of Louisville*, 15 B. Mon. (Ky.) 642. *Richland v. Lawrence*, 12 Ill. 1. *People v. Mayor, &c. of Chicago*, 51 Ill. 1. *Grogan v. San Francisco*, 18 Cal. 590. *Hewison v. New Haven*, 37 Conn. 475. The same conclusion is arrived at, after a full and clear discussion of the subject, in *Dillon, Mun. Corp.* (4th ed.) §§ 66-68, and notes. See also *Cooley, Taxation*, 688.

In this Commonwealth the question has not directly arisen in reference to the power of the Legislature to compel a transfer of the property of a city or town, but the double character of cities and towns in reference to their duties and liabilities has very often been adverted to. When a city or town acts merely as an agent of the State government in performing duties for the general benefit, it is usually held free from liability to persons who sustain injuries through negligence, except in the case of defective highways, which constitute an exception to the general rule. But in other cases, where an element partly commercial comes in, a liability is usually enforced. *Tindley v. Salem*, 137 Mass. 171, 172, and cases cited. *Worden v. New Bedford*, 131 Mass. 23. *Bailey v. Mayor, &c. of New York*, 3 Hill (N. Y.), 531. In such cases, the ultimate question usually is, Did the Legislature mean that the city or town, or other

creature of statute, should be liable for negligence, or did it not? *Howard v. Worcester*, 153 Mass. 426. *Southampton & Itchin Bridge v. Southampton*, 8 El. & Bl. 801, 812. *Cowley v. Mayor, &c. of Sunderland*, 6 H. & N. 565, 573. *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686, 707, 709, 710, 721. But in determining this question courts make a discrimination in respect to the character of the duties and of the property which are involved. Nowhere else has this ground of distinction been more often or more strongly insisted on than in Massachusetts. See cases cited in *Tindley v. Salem*, 137 Mass. 171, 174; *Pratt v. Weymouth*, 147 Mass. 245, 254; *Neff v. Wellesley*, 148 Mass. 487, 493; *Lincoln v. Boston*, 148 Mass. 578; *Curran v. Boston*, 151 Mass. 505, 508. In the recent case of *Merrimack River Savings Bank v. Lowell*, 152 Mass. 556, we had occasion to make an analogous discrimination between the general duty which the city of Lowell was under to furnish water on equal terms to all its inhabitants, and the particular undertaking to furnish water for a year to an individual who had paid a year's rates in advance.

In the case before us, we have to determine whether the title of the city of Boston to the Mount Hope Cemetery is subject to legislative control, and this involves an inquiry to some extent into the usages and laws in this Commonwealth relating to burying grounds, with a view of ascertaining whether, in the ownership of such property, towns have heretofore been regarded or have acted merely as agencies of the State government.

[After a very full statement as to the usages and legislation of the State, the opinion proceeds:]

Such being the laws and usages of the Commonwealth before the time when the city of Boston made its first purchase of the Mount Hope Cemetery, the city, by St. 1849, c. 150, was "authorized to purchase and hold land for a public cemetery in any town in this Commonwealth, and to make and establish all suitable rules, orders, and regulations for the interment of the dead therein, to the same extent that the said city of Boston is now authorized to make such rules, orders, and regulations for the interment of the dead within the limits of the said city."

Before any purchase under this statute was made, a general statute was passed which included Boston, St. 1855, c. 257, § 1, providing that "Each city and town in the Commonwealth shall provide one or more suitable places for a burial ground, within which the bodies of persons dying within their respective limits may be interred," and forbidding the use for the burial of the dead of any land in any city or town other than that already used or appropriated for that purpose, without permission. It also was, and long had been, the duty of the overseers of the poor of each town to bury paupers and indigent strangers dying therein. St. 1793, c. 59, §§ 9, 13. Rev. Sta. c. 46, §§ 13, 16. (See also, for later statutes on the same subject,

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Gen. Sts. c. 70, §§ 12, 15; Pub. Sts. c. 84, §§ 14, 17, enlarging their duties.) Being under these positive duties, and having authority under St. 1849, c. 150, to go outside of the city limits for a burial ground, the city of Boston purchased the largest portion of the land of the Mount Hope Cemetery in West Roxbury in 1857, and has since added to the same at various times, and has received large sums from the sale of lots or burial rights, and has expended large sums in the care and management thereof, and about forty acres still remain unsold. There is no suggestion in argument that in any of these particulars it has acted beyond its powers.

Sales not limited to citizens of Boston.

We are not aware that the sale of burial rights in this cemetery has ever been limited to inhabitants of Boston. No such limitation is expressed in the ordinance, but sales may be made to any person or persons. Rev. Ordinances, 1885, c. 47, § 4. By St. 1877, c. 69, § 7, re-enacted in Pub. Sts. c. 82, § 15, towns may sell exclusive burial rights to any persons, whether residents of the town or otherwise, in their cemeteries; and this right extends to cities. Pub. Sts. c. 3, § 3, cl. 23. There can be no doubt that the city held this cemetery not only for the burial of poor persons, but with the right to make sales of burial rights to any persons who might wish to purchase them, whether residents or non-residents. With these duties, and also with these rights and privileges, the city has acquired and improved this property. It is not as if the land had been procured and used exclusively as a place for the free burial of the poor, or of inhabitants of Boston. In addition to these purposes, the city has been enabled to provide a well ordered cemetery, with lots open to purchase, under carefully prepared rules and regulations, and thus to afford to its inhabitants the opportunity to buy burial places without being compelled to resort to private cemetery companies, where the expense would probably be greater; and it has done this upon such terms that the burial of its paupers has been practically without expense in the past, and it has about forty acres remaining, the proceeds of which when sold would go into the city treasury but for the requirement of St. 1889, c. 265.

Transfer to

The St. of 1889, c. 265, requires the city to transfer to the newly formed corporation, called "The Proprietors of Mount Hope Cemetery," without compensation, this cemetery, with the personal property pertaining thereto, and with the right to any unpaid balances remaining due for lots already sold, and the annual income of certain funds held for the perpetual care of lots. If such transfer is made, all that the city would retain would be the right to bury such persons as it is or may be by law obliged to bury in a certain prescribed portion of the cemetery. Its previous conveyances of lots and rights of burial are expressly confirmed. But it is apparent from the considerations heretofore expressed, that this is not property which is held exclusively for purposes strictly public. The city of Boston is possessed of much other property which in a certain sense and to a cer-

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tain extent is held for the benefit of the public, but in other respects is held more like the property of a private corporation. Notably among these may be mentioned its system of water works, its system of parks, its market, its hospital, and its library. In establishing all of these, the city has not acted strictly as an agent of the State government, for the accomplishment of general public or political purposes, but rather with special reference to the benefit of its own inhabitants. If its cemetery is under legislative control, so that a transfer of it without compensation can be required, it is not easy to see why the other properties mentioned are not also; and all the other cities and towns which own cemeteries or other property of the kinds mentioned might be under a similar liability.

In view of all these considerations, the conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the Constitutions of Massachusetts and of the United States so that the Legislature has no power to require its transfer without compensation. Const. of Mass., Dec. of Rights, Art. X. Const. of U. S., Fourteenth Amendment.

In judging of the validity of the particular statute under consideration, St. 1889, c. 265, there are other reasons leading to the same result. The first is, that the duties of the city in respect to providing a burial place for the poor and for persons dying within its limits are not taken away. The city is still bound to provide one or more suitable places for the interment of persons dying within its limits; Pub. Sts. c. 82, § 9; and it is still bound to bury its paupers and indigent strangers. Pub. Sts. c. 84, §§ 14, 17. If this cemetery should be conveyed away, under the provisions of St. 1889, c. 265, the city would be bound to provide another. Certainly the mere continuance of the city's right to bury in a limited portion of the cemetery such persons as the law requires it to bury is not a provision adequate to meet the requirement of Pub. Sts. c. 82, § 9, and by the report of facts the portion referred to is not likely to suffice even for the burial of paupers for any great length of time. The city is bound to provide a suitable place for the interment of persons dying within its limits; not poor persons only, but all persons; and the burial of the dead in ground not sanctioned by the city authorities is strictly forbidden. So far as we know, it has never been held that the Legislature may require a city or town, without compensation, to transfer property which it has bought in order to enable it to discharge its statutory obligations, while at the same time its duties and obligations continue to rest upon it. On the other hand, it is justly assumed that, if the property is to be transferred, the duties will be transferred also. *Rawson v. Spencer*, 113 Mass. 40. *Commonwealth v. Plaisted*, 148 Mass. 375, 386. *Whitney v. Stow*, 111 Mass. 368. *Mayor, &c. of Baltimore v. State*, 15 Md. 376. But the duty of

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burying paupers, and of providing a place for the interment of all persons dying in Boston, is not imposed upon the petitioner. The duties of the city, and the duties of the petitioner under St. 1889, c. 265, are not the same.

Moreover, the legislative power over municipal property, when it exists, does not extend so far as to enable the Legislature to require a transfer without compensation to a private person or private corporation. The control which the Legislature may exercise is limited; it must act by public agencies and for public uses exclusively. If the city has purchased property for purposes which are strictly and purely public, as a mere instrumentality of the State, such property is so far subject to the control of the Legislature that other instrumentalities of the State may be substituted for its management and care; but even the State itself has no power to require the city to transfer the title from public to private ownership. Upon the division of counties, towns, school districts, public property with the public duty connected with it is often transferred from one public corporation to another public corporation. But it was never heard of that the Legislature could require the city without compensation to transfer its city hall to a railroad corporation, to be used for a railway station, merely because the latter corporation has a charter from the Legislature, and owes certain duties to the public.

It is contended in behalf of the petitioner that it is a public corporation, wholly under the control of the Legislature. But it is an error to suppose that a corporation becomes a public one merely by receiving a charter from the Legislature, by owing certain duties to the public, and by being subject to rules and regulations established in the exercise of the police power. There is nothing in the case cited — *Woodlawn Cemetery v. Everett*, 118 Mass. 354 — to show that the Woodlawn Cemetery was regarded as a public corporation. It clearly was not so. It was said to be subject to the police power, like other cemetery corporations. *Commonwealth v. Fahey*, 5 Cush. 408. But liability to the exercise of the police power rests on different considerations, and that power does not extend so far as to include a right to require the transfer of property to another person without compensation. The distinction between public and private corporations is well marked and clear. Public corporations are governmental and political, like counties, cities, towns, school districts, — mere departments of the government, established by the Legislature, and modified, and destroyed, without their own consent. Private corporations are formed by the voluntary agreement of their members, and cannot be established without the consent of the corporators. Public corporations, as has been seen, may to some extent in relation to the ownership of property partake of the character of private corporations; and, on the other hand, many private corporations are charged with some duties and obligations to the public, as in the case of railroad, telegraph, canal, bridge, gas, and water companies.

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Lumbard v. Stearns, 4 Cush. 60. *Worcester v. Western Railroad*, 4 Met. 564. *Commonwealth v. Smith*, 10 Allen, 448, 455. But the general line of distinction between the two classes of corporations is clear. *Linehan v. Cambridge*, 109 Mass. 212. *Rawson v. Spencer*, 113 Mass. 40, 45. Morawetz on Corp. §§ 3, 24, 1114. 2 Kent Com. 275. 1 Dillon, Mun. Corp. (4th ed.) §§ 19, 22, 44, 54, 56. Angell & Ames on Corp. §§ 14, 30, *et seq.* *University of Maryland v. Williams*, 9 Gill & J. 365, 397. *Ten Eyck v. Delaware & Raritan Canal Co.* 3 Harr. (N. J.) 200. *Hanson v. Vernon*, 27 Iowa, 28, 53. *In re Deansville Cemetery Association*, 66 N. Y. 569.

An examination of the provisions of St. 1889, c. 265, leaves no doubt that the petitioner falls within the class of private corporations. Its corporate members are such of the proprietors of burial lots in the existing cemetery as shall accept the act and notify the clerk of the corporation of such acceptance. Membership is wholly voluntary, and in point of fact only about one person out of eight who were entitled to do so became members. The corporation is to be subject to all the provisions of the Pub. Sts. c. 82, so far as they can be applied thereto, and except so far as inconsistent with St. 1889, c. 265. Chapter 82 of the Public Statutes relates mostly to private cemetery companies, which may be organized by any ten or more persons. *Jenkins v. Andover*, 103 Mass. 94, 104. Such private cemetery corporation may lay out its real estate into lots, and upon such terms, conditions, and regulations as it shall prescribe may grant and convey the exclusive right of burial, etc. There is nothing in St. 1889, c. 265, limiting this right, unless in § 5, providing that the city shall continue to have the right of burial, in a certain prescribed portion of the cemetery, of persons for whose burial it is or may be bound by law to provide, viz. paupers and indigent strangers. Subject to this, the petitioner may sell all the remaining lots, as fast as it can, to all applicants. It is true, under Pub. Sts. c. 82, § 2, it cannot make dividends from the proceeds of sales; but the Proprietors of the Cemetery at Mount Auburn, and many other private cemetery corporations, are under the like restriction. If the city retains the ownership, it may devote the proceeds of sales of lots, after providing for the suitable maintenance of the cemetery, towards the purchase of a new burial place for its inhabitants when occasion may require. If the petitioner owns it, the city will lose that advantage. No duty to the public is imposed upon the petitioner by the terms of the statute, unless it is contained in the words in § 4 of St. 1889, c. 265, "to be held by said corporation, so far as consistent herewith, for the same uses and purposes, and charged with the same duties, trusts, and liabilities for and subject to which the same are now held by said city"; and the further words, "and the said corporation shall have in respect of said cemetery all rights, powers, and privileges, and be subject to all duties, obligations, and liabilities, now had or sustained by said city in respect thereof." What

these duties towards the inhabitants of Boston are, it may be difficult to say. Certainly there appears to be nothing binding the corporation to give any preference to inhabitants of Boston in the sale of burial rights, or to prevent a substantial increase in the prices of such burial rights, at the will of the corporation. In short, there is nothing in the act to secure to the inhabitants of Boston those privileges in respect to burial rights which they might properly expect, even if they could not legally demand the same, from the city itself. There is therefore no ground on which the petitioner can be said in any just sense to be a public corporation, and its duties to the inhabitants of Boston are at best but vague and shadowy.

The city further urges that the obligation of the contracts into which it has entered with purchasers of burial rights, for the perpetual care of their lots, would be impaired by the provisions of St. 1889, c. 265. Since, for the reasons already given, we are of opinion that the statute was beyond the power of the Legislature, it is not necessary to consider this ground of objection to its validity.

*Petition dismissed.*¹

ATKIN v. KANSAS.

33

1908. 191 U. S. 207.

8-h. day & rate of wages.
Street work

PROSECUTION under the eight-hour law of Kansas, being §§ 3827, 3828 and 3829 of the General Statutes of 1901; by which it was provided that eight hours should constitute a day's work for all laborers employed by or on behalf of the State, or any county, city, township or other municipality of the state, and that the current rate of wages should be paid; and that contractors in the execution of contracts with the State, city, etc., should be subject to the provisions of the act. A penalty was provided for violation of the act. The defendant, a contractor with Kansas City for paving a street, is prosecuted for permitting and requiring a person employed by him to labor ten hours. It is agreed that the work he was employed to do was not hazardous or dangerous to health.²

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HARLAN, J. The case has been stated quite fully, in order that there may be no dispute as to what is involved and what not involved in its determination.

No question arises here as to the power of a State, consistently with the Federal Constitution, to make it a criminal offense for an employer in purely private work in which the public has no concern, to permit or to require his employes to perform daily labor in excess of a pre-

¹ See *People v. Detroit*, 28 Mich. 228.

² This short statement is substituted for that of the Reporter. Arguments omitted. — Ed.

scribed number of hours. One phase of that general question was considered in *Holden v. Hardy*, 169 U. S. 366, in which it was held that the Constitution of the United States did not forbid a State from enacting a statute providing — as did the statute of Utah there involved — that in all underground mines or workings and in smelters and other institutions for the reduction or refining of ores or metals, the period of the employment of workmen should be eight hours per day, except in cases of emergency when life or property is in imminent danger. In respect of that statute, this court said: "The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal Courts. While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting."

As already stated, no such question is presented by the present record; for, the work to which the complaint refers is that performed on behalf of a municipal corporation, not private work for private parties. Whether a similar statute, applied to laborers or employes in purely private work, would be constitutional, is a question of very large import, which we have no occasion now to determine or even to consider.

Assuming that the statute has application only to labor or work performed by or on behalf of the State, or by or on behalf of a municipal corporation, the defendant contends that it is in conflict with the Fourteenth Amendment. He insists that the Amendment guarantees to him the right to pursue any lawful calling, and to enter into all contracts that are proper, necessary or essential to the prosecution of such calling; and that the statute of Kansas unreasonably interferes with the exercise of that right, thereby denying to him the equal protection of the laws. *Allgeyer v. Louisiana*, 165 U. S. 578; *Williams v. Fears*, 179 U. S. 270. In this connection, reference is made by counsel to the judgment of the Supreme Court of Kansas in *Ashby's* case, 60 Kansas, 101, 106, in which that court said: "When the eight-hour law was passed the Legislature had under consideration the general subject of the length of a day's labor, for those engaged on public works at manual labor, without special reference to the purpose or occasion of their employment. The leading idea clearly was to limit the hours of toil of laborers, workmen, mechanics, and other persons

in like employments, to eight hours, without reduction of compensation for the day's services."

"If a statute," counsel observes, "such as the one under consideration is justifiable, should it not apply to all persons and to all vocations whatsoever? Why should such a law be limited to contractors with the State and its municipalities? . . . Why should the law allow a contractor to agree with a laborer to shovel dirt for ten hours a day in performance of a private contract, and make exactly the same act under similar conditions a misdemeanor when done in the performance of a contract for the construction of a public improvement? Why is the liberty with reference to contracting restricted in the one case and not in the other?"

These questions — indeed, the entire argument of defendant's counsel — seem to attach too little consequence to the relation existing between a State and its municipal corporations. Such corporations are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the Legislature; the authority of the Legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed. *Rogers v. Burlington*, 8 Wall. 654, 663; *United States v. Railroad Co.*, 17 Wall. 322, 328-329; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 525; *State Bank of Ohio v. Knoop*, 16 How. 369, 380; *Hill v. Memphis*, 134 U. S. 198, 203; *Barnett v. Denison*, 145 U. S. 135, 139; *Williams v. Eggleston*, 170 U. S. 304, 310. In the case last cited we said that "a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the Legislature." It may be observed here that the decisions by the Supreme Court of Kansas are in substantial accord with these principles. That court, in the present case, approved what was said in *City of Clinton v. Cedar Rapids & Missouri River R. R. Co.*, 24 Iowa, 455, 475, in which the Supreme Court of Iowa said: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the Legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the Legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations of the State, and the cor-

porations could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the Legislature." See also *In re Dalton*, 61 Kansas, 257; *State ex rel. v. Lake Koen Co.*, 63 Kansas, 394; *State ex rel. v. Com'rs of Shawnee Co.*, 28 Kansas, 431, 433; *Mayor, &c. v. Groshon*, 30 Maryland, 436, 444.

The improvement of the Boulevard in question was a work of which the State, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character.

Work public
in character

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If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the State, does not infringe the personal liberty of any one. It may be that the State, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employes, mechanics and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work for it or for one of its municipal agencies, should permit or require an employe on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best — as undoubtedly it is — and that to make it a criminal offense for a contractor for public work to

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permit or require his employé to perform labor upon that work in excess of eight hours each day, is in derogation of the liberty both of employés and employer, it is sufficient to answer that no employé is entitled, of absolute right and as a part of his liberty, to perform labor for the State; and no contractor for public work can excuse a violation of his agreement with the State by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

Function of Judiciary

So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true — indeed, the public interests imperatively demand — that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. It cannot be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed its constitutionality is beyond all question.

protection
uq.

Equally without any foundation upon which to rest is the proposition that the Kansas statute denied to the defendant or to his employé the equal protection of the laws. The rule of conduct prescribed by it applies alike to all who contract to do work on behalf either of the State or of its municipal subdivisions, and alike to all employed to perform labor on such work.

Some stress is laid on the fact, stipulated by the parties for the purposes of this case, that the work performed by defendant's employé is not dangerous to life, limb or health, and that daily labor on it for ten hours would not be injurious to him in any way. In the view we take of this case, such considerations are not controlling. We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done.

The judgment of the Supreme Court of Kansas is *Affirmed.*

RYAN v. THE CITY OF NEW YORK.

34

1904. 177 N. Y. 271.

PARKER, C. J. There are two questions presented by this review. The first is, Has the legislature power to provide that its employees and those of the several municipalities shall receive "not less than the prevailing rate" of wages in the locality? In other words, has the legislature — which possesses all the power of the sovereign not expressly withheld by the Constitution — power to provide that work done for it or its several subdivisions shall be paid for at such a rate as individuals and corporations in the same locality pay?

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That question was before this court some years ago in so far as it affects the right of the legislature to fix the rate of wages of laborers upon the works of the state (*Clark v. State of New York*, 142 N. Y. 101). In 1889 the legislature passed an act (L. 1889, ch. 380) providing that the rate of wages upon the public works of the state should be \$2 a day. That was more than the then prevailing rate, and there were those who questioned the power of the state to interfere with its agents in fixing the wages of men working under them. They thought the superintendent of public works had the sole power of fixing wages of employees in that department, and, therefore, could defy the direction of the legislature as to the amount of compensation to be paid, although he could disburse such moneys only as were appropriated by the legislature. And they entreated the attorney-general to commence an action to have the court declare the impotency of the legislature to interfere on the important subject of compensation to laborers. But when the case reached this court in 1894 the attorney-general was unable to point to the provision of the Constitution which divested the representatives of the People for all matters of legislation of this power, and vested it in the several inferior officials having charge of certain administrative duties conferred upon them in the majority of instances by acts of the same legislature. The court — unaffected, as was its duty, by the argument that the statute was unwise and mindful that its duty was discharged fully and could only be discharged by declaring whether the legislature had the power to enact the statute complained of — unanimously held that the power belonged to it. Judge O'BRIEN, writing for the unanimous court, says (142 N. Y. 101, 105): "There is no express or implied restriction to be found in the Constitution upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public works of the state."

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The principle of that decision controls this one. There the legislature undertakes to fix arbitrarily the sum to be paid to every employee of the state. Here the legislature undertakes to provide for the payment of not less than the prevailing rate of wages, not only to the

direct employees of the state, but also to its indirect employees working in its several subdivisions—the cities, counties, towns and villages. In the administration of the affairs of those subdivisions, as well as in those of the state at large, the legislature is unrestrained unless by express provisions of the Constitutions. As expressed in *Rodgers' case*, 166 N. Y. 1, 29: "The authority of the state is supreme in every part of it and in all of the public undertakings the state is the proprietor. For convenience of local administration the state has been divided into municipalities, in each of which there may be found local officers exercising a certain measure of authority, but in that which they do they are but the agents of the state, without power to do a single act beyond the boundary set by the state acting through its legislature." Thus all of these agencies and employees in the several municipalities are doing the work of the state, which is the sovereign and master.

Nevertheless, we find that the argument is again made, as in 1894 in *Clark's case*, that the legislature is without power to interfere with the agencies it has created for the government of the municipalities. And this is said in the face of the decision in *Clark's case*, and notwithstanding the fact that the legislature has the power at any time to absolutely change the form of government of a municipality, to blot out of existence any municipal charter, or to consolidate several municipalities under a single charter, as it did in the creation of Greater New York. And this argument is made in spite of the many well-known illustrations of the power of the legislature to control the affairs of municipalities. The scope of that power is illustrated by the construction of the new aqueduct by a board created by the legislature, the expense being charged upon the city of New York, although not a single officer of the city had a voice in controlling the expenditure of the millions that its construction involved; and by the act compelling the elevation of the Harlem railroad tracks in the city of New York, and the imposition of one-half of the expense, amounting to several millions, upon the city of New York, the work all being done through an agency created by the state.

Not only does the legislature fix the salaries of the principal municipal officers throughout the state, but in the city of New York, where this case arises, it fixes the rate of compensation for many laborers. The street cleaning department will serve as an illustration. The charter provides for the payment of definite sums in some cases, and for a maximum sum in others, for a force numbering over 5,000 employees in that department, and including 3,100 sweepers and 1,600 drivers, hostlers and stable foremen. The charter in this respect has the support of *Clark's case*, *supra*. Now there are a few mechanics connected with the department whose compensation is not fixed by the charter, and who, therefore, come under the prevailing rate provision of the Labor Law. Their compensation could be fixed of course at a definite sum as that of the other employees is, but instead it is pro-

vided in effect that they shall be paid at a rate not less than that paid by others for similar services in that locality. Certainly no one can argue that the legislature can provide that the street sweeper shall be paid — for example — \$2 a day, but cannot provide that he shall be paid the prevailing rate of wages when that happens to be \$2. But if one can be found who will attempt to make such an argument surely it can be safely said that he cannot find a constitutional provision upon which to rest it.

[The court here considered the opinion of the Supreme Court of the United States in *Atkin v. State of Kansas*, 191 U. S. 207.]

The case under consideration is not controlled by *Rodgers' case*, 166 N. Y. 1. The decision in that case is that so much of the statute as in effect requires a contractor for municipal work to agree that he will pay his workmen not less than the prevailing rate of wages, and makes the contract void if he fails to pay at such rate, at least, is unconstitutional. It is said by the court in support of that decision that the statute invades rights of liberty and property in that it denies to the contractor the right to agree with employees as to the rate of compensation, and imposes a penalty upon the right of the contractor to agree with employees upon terms of employment. It is true that in one of the prevailing opinions argument sufficiently broad to cover this case is made, but it is not necessary for the decision, and is *obiter*, and, therefore, need not be followed. Our conclusion is that so much of the statute as is involved in this case is constitutional.

The second question presented by the record is: Did the plaintiff waive his right to insist that his compensation should be at the prevailing rate of wages for rammers in the city of New York? Section 3 of the Labor Law does not attempt to fix in dollars and cents the wages to be paid to those employed on state or municipal work, but provides that such wages "shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality." The statute, therefore, made it the duty of the person charged with employing plaintiff to ascertain the prevailing rate of wages for similar services in the city, and then to fix the compensation at that amount, or a still greater one, and by the section following the legislature undertook to assure such action by the officials commanded to fix wages at not less than the prevailing rate by providing that an official violating the provisions of the act would be guilty of malfeasance in office, and be suspended or removed.

We must assume — in view of the fact that the question arises from a demurrer to the complaint — that all of its allegations are true, and that the officer employing the plaintiff did not obey the statute, and hence became subject to its penalties. But that fact in nowise aids the plaintiff in his present contention. He had been in the employ of the city for some time prior to May 10, 1894 — when the statute

went into operation — at the rate of \$3 a day, and that sum the city continued to pay, and he to receive without protest, for a period of six years. The prevailing rate of wages for that period was \$3.50 a day, and the employing officer should have fixed plaintiff's wages at that sum or greater. But he did not do it, and while the plaintiff could have properly insisted that the officer should heed the command of the statute in that respect, he chose instead to continue in the service of the city without objecting to the compensation.

Now, "it is well settled by authority that a man may waive any right that he has, whether secured to him by contract, conferred on him by statute or guaranteed him by the Constitution." *People ex rel. McLaughlin v. Bd. Police Comrs.*, 174 N. Y. 450, 456, and cases cited. And the legal effect of plaintiff's action in accepting from time to time during a period of six years, without protest, the wages paid to him by the city, was to waive any claim that he might have had at the time to insist that the employing officer should fix his rate of compensation at a greater sum than he did.

—It follows that plaintiff is not entitled to recover.

The judgment should be affirmed, with costs.

O'BRIEN, J. This was an action to recover arrears of wages claimed by the plaintiff to be due to him. The plaintiff alleges in his complaint that the defendant is indebted to him in the sum of six hundred dollars for arrears of pay as a laborer on the streets at the rate of fifty cents per day for each work day that he was employed by the defendant during a period of about six years and paid at the rate of three dollars per day. In substance, his claim is that, during all this time, he was not paid enough and if the city had obeyed that provision of the Labor Law requiring it to pay "the prevailing rate of wages" he would have received three dollars and fifty cents per day.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The courts below sustained the demurrer and the plaintiff has appealed to this court from the judgment. The complaint alleges that, prior to the enactment of the Labor Law on May 10, 1894, the plaintiff had been in the employ of the city as a laborer on the streets and was paid therefor at the rate of three dollars per day, but claims no arrears of pay on account of such services. It is then alleged that the Labor Law was enacted on May 10, 1894 (Chap. 622, Laws of 1894), and that the plaintiff from that date became entitled to receive wages at the prevailing rate, and that such rate, upon the law taking effect, became three dollars and fifty cents per day. It is then stated that, after the law went into effect, the plaintiff continued to work in the same capacity by the day during about six years, to the first of January, 1900, working in all twelve hundred days and was paid therefor at the rate of three dollars for every day, or three thousand six hundred dollars in all, whereas if the prevailing rate of wages law had been observed he would have received four thousand two hundred dollars.

The difference between these two amounts is the sum for which judgment is demanded.

It appears, therefore, from the face of the complaint that the plaintiff worked for the defendant before the law took effect and for six years after, receiving the same wages after the law as before. The course of dealing between the parties during such a long period of time, in the absence of some allegation of fraud, mistake, or of a right expressly reserved, justifies the legal inference that there was a contract between the parties, expressed or to be implied, that the plaintiff was to receive for his work three dollars per day and no more, or that he has waived all claim under the statute. When a servant sues the master for wages, alleging that he worked by the day for more than six years, and was paid for each day's work at the rate of three dollars per day, and makes no claim or allegation that he ever asked any more, or ever objected on the ground that he had not been paid enough, or that he reserved the right to demand more in the future, or that there was fraud or mistake in the dealings, the legal conclusion from the facts must be that there was a full settlement between the parties or an agreement as to the rate of wages, or a waiver of any other claim. *McCarthy v. Mayor, etc., of N. Y.*, 96 N. Y. 1. I understand that there is no difference of opinion in this court on this point, and, if not, then the case is decided and it is not necessary to discuss the validity of the Labor Law. That question, as I think, is no longer open in this court. *People ex rel. Rodgers v. Coler*, 166 N. Y. 1; *People ex rel. Treat v. Coler*, id. 149; *People ex rel. Lentilhon v. Coler*, 168 N. Y. 8; *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112; *People v. Orange Co. R. C. Co.*, 175 N. Y. 84. It is, however, supposed to be necessary or useful to reopen that controversy and to make a fanciful distinction between the decisions already made and the case at bar. There can be no sound distinction in the application of the statute to the direct and immediate employees of a city and the case of an independent contractor who has not observed the law. The contention that in the former case the law may be held good though it may be void as to the latter is not based upon any sound reason and is in conflict with the authorities cited. The defendant's charter provides that certain public work, involving the expenditure of money beyond a certain designated amount, must be done by contractors whose bid for the work is the lowest or most favorable to the city, and as to work below this amount it may be done by the city itself directly through its own employees. We have certainly held that, as to the former class of work, the statute with respect to "the prevailing rate of wages" is void, although in that case the city inserted "the prevailing rate of wages" clause in the contract. It is now earnestly contended that there is a distinction to be observed with respect to the validity of the law when applied to the same class of laborers working for a contractor and those working for the city. That as to the former the law is in conflict with the Constitution, while

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as to the latter it is perfectly valid. Just how the law can bind the city and not bind the contractor is difficult to conceive, since the latter is an instrument of the former in carrying out the purpose of its incorporation. The contractor has no standing to question a valid law under which the city acted when entering into a contract with him. I will only add that, to my mind, there is something preposterous in the proposition that this statute cannot, as we have held, bind a contractor digging a sewer on one side of a street while it can and does bind the city superintendent of streets repairing a pavement on the other side. But if the question was a new one there is, I think, but little difficulty in its proper solution. The question, in its last analysis, is a very simple one, and that is whether a mandatory statute which requires a city to pay to its employees a fixed sum as compensation for their work or as wages is a constitutional exercise of legislative power.

There can be no distinction in this respect between a statute which fixes the wages of servants directly in dollars and cents at so much per day or so much per hour and a statute which fixes minimum wages by some known or ascertainable rule or standard. The statute requiring the defendant in this case to pay to its workmen a sum described as "the prevailing rate of wages" is, under the circumstances of the case, just as objectionable as if it specified the sum to be paid, since in the one case as well as in the other the city is deprived of the right to make contracts with its employees, fixing the rate of wages, and of all discretion with respect to the same. Considering the power of the legislature over this subject, the question is not always what has been done but what may be done, if the power claimed be conceded. If, in this case, the statute had fixed the plaintiff's wages at five dollars per day there could be no objection made to the law that cannot be made now. If the statute in that case would be bad then the law in its present form is open to the same objection. We learn from the complaint in this case the important fact that just as soon as the statute went into operation "the prevailing rate of wages" instantly rose over fifteen per cent, which is an object lesson throwing much light upon the nature of the power assumed in the passage of the law. It simply means that the legislature has the power to raise or depress wages at pleasure under the vain hope or excuse that the changes will be confined to the boundaries of cities.

There is no attempt made, and obviously none can well be made, to bring the law within the scope of the police power. It cannot be said that it is a law to promote the public health, or public safety, or public order, and no element can possibly be injected into it to render it valid as a police regulation. There is but one ground, if I understand the argument, upon which this law is defended, and that is, when stated in the broadest way, that cities have no rights that the legislature may not regulate and change at pleasure, since cities, it is said, are created and exist only by the will of the legislature and that the power to which they owe their existence is supreme over every detail of their

internal affairs; that a city is but an agency of the state that the latter may command, coerce or direct at will. Arguments that contain a considerable element of truth are often difficult to answer, even though when considered as a whole they may be unsound and quite misleading, as this argument certainly is. It is often said in a very general way that cities and other public municipal corporations are agencies of the state, and that is true in so far as they are invested with powers, political or governmental, but surely no one will claim that the relation of principal and agent exists between the state and its several municipalities. Agency is a relation that is generally founded in contract, and the agent, within the scope of his powers, speaks and acts for his principal and so binds him. The principal may impose his will upon the conduct of the agent by commanding him what to buy and what to sell and he may fix the price at his pleasure. But it is scarcely necessary to argue that no such relation can possibly exist between the defendant and the state. The city of New York is not an agent of the state in the sense that the legislature may dictate what price it must pay for property or labor that it may need in the conduct of its local affairs. If this were so, then there can be no such thing as home rule for cities and the idea apparently so popular and so much commended is a delusion.

The precise question that we have to deal with here is whether the most important city on this continent, if not in the world, has got such a measure of autonomy and home rule as to render it independent of legislative interference, at least with respect to the price that it shall pay for common labor or other property that it may require in performing its functions as a local government. It would be of very little use to provide, as the Constitution of this state does, that local officers in cities must be either elected by the people or appointed by some local authority, if it still remained in the power of the legislature to prescribe, by statute, to the officers who are elected to take charge of the streets or public works, the minimum wages which the city must pay for labor, or the price it must pay for property, thus depriving the officer of all judgment and discretion in regard to his duties. If a local officer, as the representative of the city, is not left free in this respect he cannot be said to be acting in the exercise of his own judgment or in the interest of the locality but simply obeying the will of the central power. A corporation, whether public or private, is a person within the meaning of the constitutional guaranties for the security of liberty, property and the equal protection of the law. If, therefore, the legislature may not dictate, by statute, to a private person or corporation what he or it shall pay for property, or the rate of wages to be paid to employees, I fail to see where it can get the power to dictate to the city the wages it must pay to the men it must employ in the care of its streets or other public works. If the legislature can deprive a city of the right to hire its own laborers at such wages as they can mutually agree on, why can it not deprive every corporation of the same right?

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A private corporation is just as much a creature of the state as a public corporation, but no one has yet contended that a law fixing the rate of wages for a private corporation would be good. When the state creates a corporation, public or private, and sends it forth upon its mission, it becomes invested by the Constitution and the law of its creation with certain rights and privileges that are as inviolable as those of private persons. Its property may not be confiscated or taken from it except by its consent or by due process of law. It cannot be denied the equal protection of the law. The money which a city procures by the exercise of the taxing power cannot be diverted, directly or indirectly, to any private purpose or for the benefit of any class as such. And yet all these constitutional guaranties may be violated if the legislature can fix the wages of laborers or the price to be paid for any property that the municipality may need.

That some or all these constitutional rights have been invaded by the statute in question is quite evident. That will appear from the facts of the present case, and by that I mean the facts stated in the complaint and those that are fairly to be inferred therefrom. The city of New York, in the exercise of its chartered powers, must purchase immense amounts of property, real and personal, and must employ a vast army of laborers, and the money to pay for the same must be procured by local taxation. The state, as such, bears no part of these expenses, and the question is whether it may prescribe by statute the price which the city must pay for such property or the wages for such labor, or must all these things be left for the city itself to settle by agreement upon such terms as may be reasonable, just as such matters are settled by private corporations or individuals? If the legislature should pass a statute prescribing the minimum price that the defendant should pay for the carpets and furniture in the city hall and should even name the merchant or dealer from whom alone they could be purchased, every argument adduced to uphold the statute in question would apply with equal force to such a law. If the legislature has the power to fix the price of common labor, what objection can there be to a statute fixing the minimum or maximum price of such commodities? This case is a good illustration of the operation of a statute fixing the price of labor. We are informed by the complaint that, prior to the enactment of the Labor Law on May 10, 1894, the plaintiff was employed by the day to work on the streets and was paid wages at the rate of three dollars per day. There is no claim made that the wages thus paid were not fair wages or the going wages. There is no claim that the plaintiff ever asked or expected any more, but it seems, or at least the complaint so states, that, just as soon as the Labor Law went into effect on May 10, 1894, "the prevailing rate of wages" at once rose to three dollars and fifty cents per day, but the plaintiff was apparently oblivious of that fact, or, at all events, paid no attention to it, but continued to work in the same way and draw pay at the same rate for six years without, so far as appears,

making any objection to the rate of wages, or demanding any increase. Now, it is said that the city is in arrears and is indebted to him in the sum of six hundred dollars, being fifty cents more for each day that he worked and was paid three dollars per day. This claim has, of course, no foundation except in the statute, which, as he claims, gave him the right to the additional fifty cents.

If the plaintiff can recover, so can hundreds and possibly thousands of other people, and such demands in the aggregate must amount to a very large sum of money that the city must raise by taxation and pay to its employees after their work has been performed. Who will assert that the money so paid out of the treasury is devoted to a legitimate city purpose? Who can deny that the millions of dollars which the city is required to raise and pay for such arrears is not in the nature of a gratuity to private persons? The position of the city is that it owes the plaintiff nothing and if it must pay at all it will be under the coercion of the legislative enactment. The power of the legislature over municipal corporations in all matters political or governmental, within constitutional limits, is conceded, but surely that does not include the power to interfere in every detail of its internal affairs, and the right of the city to hire its own employees who work upon the streets on such terms as can be fairly agreed upon is one of the things that does not concern the state, but is confided to the local authorities. The compensation of all city authorities and of the clerical force in the several departments may be fixed and regulated by law, since their duties are public, political or governmental, but the wages of laborers or the price of property is something that cannot be fixed and regulated by statute without undermining every principle of local autonomy. It would be a very idle ceremony to provide in the Constitution that all moneys raised by taxation in cities must be devoted to city purposes if the legislature may enact a law which will enable the plaintiff at the end of six years and after drawing pay all the time at the rate of three dollars per day, that being, so far as appears, all he asked or expected, to reopen the account to add over fifteen per cent more to the amount paid to him for his labor and which it is apparent he was satisfied with at the time as his compensation.

It is no part of the legitimate powers or functions of government to fix wages any more than it is to prescribe the price of bread. If a statute may be enacted to put wages up, so may one be enacted to put wages down. If wages for the employees of a city can be fixed by a statute at five dollars per day they can be fixed at fifty cents per day, all depending upon the temper of a majority of the legislature. Such legislation cannot be justified upon the ground that it is aimed only at a great city existing under a legislative charter.

The argument in that respect embodies a fundamental error, in that it fails to observe the legal character of a municipal corporation possessed as it is of dual powers; the one governmental, legislative or public, and the other proprietary or private. When imposing taxes,

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enacting ordinances and conducting public improvements, the city is exercising a part of the sovereign power, but in hiring laborers and purchasing property for the corporate use it acts as a private individual entitled to all the privileges and immunities that the Constitution secures to private persons. These latter powers are conferred and exercised for the private advantage of the particular corporation as a distinct *legal personality*, and as to such powers and to property acquired thereunder and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* a private corporation. (Dillon on Municipal Corporations, § 66.) It is upon this principle that cities are made liable for acts or omissions under the law of negligence. The law of master and servant is applicable, just as it is applicable between private parties.

In *Conrad v. Trustees of the Village of Ithaca*, 16 N. Y. 158, it was held that where the trustees of the village were made by its charter commissioners of highways they were to be regarded, in respect to that function, not as independent public officers, but as the agents of the corporation, so as to make the latter civilly responsible for their acts of omission, according to the law of master and servant. In a note to the case last cited is published an opinion by Judge SELDON in *Weet v. Trustees of the Village of Brockport*, wherein he points out the principle that lies at the basis of the rule which makes a municipal corporation liable under the maxim of *respondeat superior* as follows: "That whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to enure to the benefit of every individual interested in its performance." This liability of the municipality as to the care of the streets was again recognized by this court in *Ehrgott v. Mayor, etc., of New York*, 96 N. Y. 264. Judge EARL, after citing *Conrad v. Trustees of Vil. of Ithaca*, 16 N. Y. 158; *Requa v. City of Rochester*, 45 N. Y. 129; *Hutson v. Mayor, etc., of N. Y.*, 9 N. Y. 163; *Davenport v. Ruckman*, 37 N. Y. 560; *Hume v. Mayor, etc., of N. Y.*, 74 N. Y. 264, observed that the rule has been somewhat criticised, but that "it has the sanction of a wise public policy, the support of good reasons, and that its operation is generally just and beneficent." This principle has been recognized in many other cases in this state that need not be cited. It has also been approved by the Supreme Court of the United States in *Barnes v. District of Columbia*, 91 U. S. 540, and by the Circuit Court of the United States in *Barney Dumping-Boat Co. v. Mayor, etc., of City of New York*, 40 Fed. Rep. 50.

In *Missano v. Mayor, etc., of N. Y.*, 160 N. Y. 123, 129, this court held, after a review of the authorities, as follows: "It is clear upon

principle and authority that the city of New York, in the ordinary and usual care of its streets, both as to repairs and cleanliness, is acting in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual, as distinguished from its governmental functions when it acts as a sovereign. *Maximilian v. Mayor, etc.*, 62 N. Y. 164."

In the present case the legislature in enacting the Labor Law was dealing with the city of New York in its proprietary or private capacity, wherein it is to be regarded as a legal individual as distinguished from its governmental functions when it acts as a sovereign.

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Sweeping aside all forms and seeking to establish the real legal situation, the city in this respect is nothing more than an aggregation of private citizens who are taxpayers and as such are entitled, acting in the combination created by the charter, to the protection through the legal entity thereby created, of all those individual rights and privileges precisely as if each was acting for himself.

If it be true, as the foregoing authorities clearly establish, that a municipal corporation, acting as a legal individual, is liable in damages for the negligence of its servant, it must logically follow that it is entitled to all the immunities and privileges incident to that situation, and this involves the right of the city under the Constitution to hire its own laborers and servants, since it would be intolerable if their employment could be regulated and controlled by the central power, while the city alone is made liable for their negligence or mistakes. The legislature may authorize burdens to be imposed upon them for public works or improvements and possibly may require the same by mandatory laws in the interest of the general public, but this does not embrace the power to dictate to the city the wages it shall pay to its employees in the performance of its work or to deprive the local authorities who act for the tax-payers of all judgment and discretion upon that subject. A tax-payer in a city has the right to have such questions decided by the judgment of the local authorities who represent him and not by the central power at the capital of the state.

It is a curious fact that every argument in support of statutes of this character, whether proceeding from the bench or the bar, contains the broad admission that if such laws were made applicable to private corporations or individuals they would then be clearly in conflict with the Constitution. These arguments, like that to sustain the statute in question, entirely overlook or ignore the important distinction between these powers and functions of municipal corporations that are public or political and those that are private. This distinction has nowhere been better stated and illustrated than in the opinion of Judge COOLEY in the case of *People ex rel. Park Comrs. v. Common Council of Detroit*, 28 Mich. 228. After stating what he considers as settled law, the proposition that cities, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities and as being entitled

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to exemptions distinct from those which they possess or can claim as conveniences in state government; that they possess powers and capacities which are *private* in contradistinction to those in which the state is concerned and which are called *public*, thus putting such corporations, as regards all such powers, capacities and interests, substantially on the footing of private corporations or individuals, the learned judge then proceeds to amplify this distinction as follows: "Whoever insists upon the right of the state to interfere and control by compulsory legislation the action of the local constituency in matters exclusively of local concern, should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify on principle, a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the state, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish a park or boulevard for the recreation and enjoyment of its citizens. The one law would rest upon the same fallacy as the other, and the reasons for opposing and contesting it would be the same in each case. And while it may be entirely possible that in any particular instance the interference would be beneficial to the person or the community whose rights are invaded, it is not to be overlooked that an interference to compel a person to submit to something for his own good may be made use of as a precedent to compel him at some future time to submit to extortion and plunder. The law very properly draws a line between that which is admissible and that which is not, and it does not allow outside dictation in matters purely of local concern, for one very good reason, among others equally good, that the motive for outside interference will very likely be something besides a desire to do good to a community in which the parties interfering have no personal interest, unless of a merely sentimental nature, and whose burdens they are not to share, or enjoyments participate in. All such matters are left to those whose interests will prompt them to act with prudence, and who because of their interest, and because they relate to matters that must come under their own view and observation, they are presumptively best qualified to decide upon."

It was held in the *Orange County Road Constr. Co. case*, *supra*, that a statute making it a crime for a person contracting with a municipal corporation to require more than eight hours' work for a day's labor was unconstitutional and void. It was held in the *Rogers case*, *supra*, that a similar statute forfeiting a contractor's right to compensation for his work if he omitted in doing the work to pay what is called the prevailing rate of wages, was also in conflict with the Constitution. In the *Rogers case* the city resisted the claim of the contractor for compensation. It had no other defense and this court held

that it constituted no answer to the contractor's claim to set up a violation of a statute which was invalid and beyond the power of the legislature to enact. What distinction, if any, there is or can be between these cases and the one at bar I confess I am unable to state. I leave that to my brethren who now differ with me, only adding that it does not seem to me wise to introduce fanciful distinctions in the construction of statutes of this character whenever the membership of the court happens to be changed. It must be remembered that in the *Rogers* case it was the city that set up and claimed the protection of the statute, and we held that the law had no force or effect to defeat the claim of the contractor, but in the present case it is to be held that it is a good basis for a common laborer upon which to assert a valid claim against the city treasury or, in other words, a statute held to be void as against the claim of the contractor is the very cornerstone and foundation for a claim against the city by one of its servants or employees.

I am in favor of affirming this judgment on the point first above stated, but I am not in favor of going out of our way to change the construction already given to the Labor Law on the basis of a distinction so frail and fanciful as that contended for by the learned counsel for the plaintiff.

HAIGHT, CULLEN and WERNER, J. J., concur with PARKER Ch. J.;
BARTLETT and VANN, J. J., concur with O'BRIEN, J.

Judgment affirmed.

CHAPTER III.

INTERNAL CONSTITUTION.

SECTION 1. *Organization.* 35

CENTRAL BRIDGE CORPORATION v. LOWELL.

1860. 15 Gray, 106.

PETITION to the county commissioners of Middlesex for the assessment by a sheriff's jury of damages occasioned by the taking and laying out of the petitioners' bridge as a public street of the city of Lowell. On March 23, 1843, an added act was passed for the regulation of tolls of the bridge, and to limit the continuation of the charter of the corporation. It contained a provision by which in a certain contingency the bridge should revert to the Commonwealth for the public use; and a further provision that it might be sooner made free on reimbursement, as provided in the original statute. This act was to take effect when accepted by the bridge corporation and by the city of Lowell, at legal meetings of the respective corporations. The act was accepted by vote of the city council of Lowell.¹

B. F. Butler and *A. P. Bonney*, for the respondents argued that as the charter of the city declared that the inhabitants of the town of Lowell should "continue to be one body politic, under the style and denomination of the City of Lowell," and provided for general meetings of the inhabitants; St. 1838, c. 128, §§ 1, 23; a legal meeting of the corporation, required by St. 1843, c. 50, § 8, for the acceptance of this act, must be a meeting of the inhabitants, and that the mayor, aldermen and common council were only officers of the corporation, and not the corporation itself. The petitioners replied that by § 8 of the city charter, all the powers of the town or of its inhabitants as a municipal corporation were vested in the city council.

SHAW, C. J. . . . The acceptance by the mayor and aldermen and common council of the city of Lowell, in due form, was a legal acceptance by the corporation, because it was done by their duly constituted representatives. All the powers of the city, as a muni-

¹ This statement of the facts material to the only question in the case which is here presented is taken from the opinion. Only so much of the opinion as deals with the question, what constitutes a legal meeting of the city, is here given. — Ed.

cipal corporation, were vested in the city council, except those, if any, specially and expressly reserved by the charter to be exercised by the people. No such reservation applies to this case.

IN RE PFAHLER.

1906. 150 Cal. 71.

omit also p. 165 36

ANGELLOTTI, J.¹ The petitioner is held in the custody of the chief of police of the city of Los Angeles, under a warrant issued upon a complaint charging him with a violation of the provisions of a certain purported ordinance of said city, which ordinance prohibits, except within certain defined limits, the killing or slaughtering of animals the flesh of which is to be sold or offered for sale or eaten. There is no claim that the complaint does not state facts sufficient to show a public offense under the provisions of said ordinance, nor is there on the part of the petitioner any claim that the ordinance, if legally enacted, was not a reasonable and valid exercise of the police power vested in such city. Petitioner's claim is that the purported ordinance has never been legally enacted.

The ordinance was not adopted in the ordinary way, by vote of the city council and approval of the mayor, but by the electors of the city at a general election, at which it was submitted for their approval or rejection, such submission having been compelled by a petition submitted to the council signed by electors equal in number to at least five per cent of the vote cast for all candidates for mayor at the last preceding election. The procedure was in strict accord with what is known as the "initiative" provision of the charter of Los Angeles, which, together with what is known as the "referendum," was made a part of such charter by amendments ratified by the people of such city at an election held December 1, 1902, and approved by the legislature of the state on January 30, 1903. See Stats. 1903, pp. 555, 572. The real question presented by this proceeding is, then, as to the validity of this provision of the charter.

ordinance adopted by initiative

The city of Los Angeles is a municipal corporation operating under a freeholders' charter, framed and adopted under the provisions of section 8 of article XI of the constitution, and approved by the legislature January 31, 1889. Stats. 1889, p. 455. By that charter the legislative power of the city was vested in a council provided for by such charter, subject to the power of veto and approval by the mayor. The initiative amendment of 1902 and 1903, so far as material to the question here presented, provides substantially as follows: Any proposed ordinance may be submitted to the council by a petition signed

¹ Only so much of the opinion as involves the constitutionality of the act under the Constitution of the United States is given. — Ed.

by registered electors of the city. If such petition is signed by electors equal in number to fifteen per cent of the entire vote cast for all candidates for mayor at the last preceding general election at which a mayor was elected, and contains a request that said ordinance be submitted forthwith to a vote of the people at a special election, the council must either, — 1. Pass such ordinance without alteration (subject to a referendary vote as elsewhere provided), and if, when passed, it is vetoed by the mayor, and on reconsideration fails of passage by the council, submit it to a vote of the people at a special election ; or 2. Call a special election, at which said ordinance, without alteration, shall be submitted to a vote of the people. If the petition is signed by electors equal in number to at least five per cent, but less than fifteen per cent of such vote, the ordinance shall be submitted to a vote of the people at the next general municipal election that shall occur at any time after thirty days from the date when the sufficiency of the petition is officially determined. "If a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city ; and any ordinance proposed by petition or which shall be adopted by a vote of the people cannot be repealed or amended, except by a vote of the people. . . . The council may submit a proposition for the repeal of any such ordinance, or for amendments thereto, to be voted upon at any succeeding general election ; and should such proposition receive a majority of the votes cast thereon at such election, such ordinance shall be repealed or amended, accordingly."

The accompanying referendum amendment provides : "No ordinance passed by the city council (except when otherwise required by the general laws of the state or the provisions of the charter, respecting street improvements, and except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency, and is passed by two-thirds vote of the council, but no grant of any franchise shall be construed to be an urgency measure, but all franchises shall be subject to the referendary vote herein provided for), shall go into effect before thirty days from the time of its final passage and its approval by the mayor." It is further provided therein that a protest against such ordinance filed during said thirty days, signed by electors equal in number to at least seven per cent of such vote, shall have the effect of suspending the ordinance from going into operation and require the council to reconsider the same, and, if that body does not entirely repeal it, submit it to the electors at a general or special election, the ordinance to go into effect or not as the majority of the electors voting thereon shall decide.

While no question as to the validity of the referendum amendment is directly involved here, we have briefly set forth its provisions, as the two amendments are simply part of the general plan or scheme looking to a more direct control of local legislation by the people of the city ; and, so far as the principal objections here made are concerned, must

stand or fall together. Those objections go to the question of the validity, under the provisions of the Constitution of the United States and our own constitution and laws, of any provision in a municipal charter which authorizes the electors of the municipality to participate directly in the enacting of local laws. These two amendments, the initiative and the referendum, have the same effect in this respect. In each, it is the vote of the electors at the ballot-box that finally determines whether or not a proposed measure shall be a law at all, and it can make no difference in principle whether the proposition originates with electors or with the council. In each, the electors by their vote at the ballot-box directly exercise legislative power. By these amendments the electors are, except in certain specified cases, given an effectual veto power as to all ordinances approved by the council, and are clothed with authority paramount to that of the council to directly enact such local legislation as they may deem expedient, where the council declines to enact the same.

The charter provision relative to the initiative, which is substantially similar to recently enacted provisions in the charters of other municipalities of the state, is vigorously attacked by counsel for petitioner and other attorneys appearing as *amici curiae*, who claim to see in this curbing of the power of the ordinary legislative body of the city, this vesting in the electors of a municipality the power to enact measures which the legislative body refuses to approve, a violation of our own constitution, and a forbidden departure from the republican form of government guaranteed by the constitution of the United States.

The latter objection may appropriately be first considered. Its sole foundation is section 4 of article IV of the constitution of the United States, which is as follows: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." The contention here is, necessarily, that any attempt by a state to provide for a direct exercise of legislative power by the people, instead of by representatives of the people elected or appointed for that purpose, is, even in purely local affairs, inconsistent with the republican form of government guaranteed by this provision, and ineffectual for any purpose, the theory being that such provision requires a purely representative form of government not only in the state itself, but also in all its subdivisions, leaving no vestige of power of direct legislation in the people themselves.

If we assume that this claim presents a judicial question rather than a political one to be determined by the Congress of the United States (see, however, *Luther v. Borden*, 7 How. 1; *Taylor v. Beckham*, 178 U. S. 548 [20 Sup. Ct. 1009]), we are brought to a consideration of the question as to what was meant by this guarantee of a republican form of government. For all the purposes of this proceeding, it is sufficient to hold, as we do, that it does not prohibit the direct exercise

of legislative power by the people of a subdivision of a state in strictly local affairs. In saying this, we do not wish to be understood as intimating that the people or a state may not reserve the supervisory control as to general state legislation afforded by the initiative and referendum, without violating this provision of the federal constitution. That they may do so has been decided by the supreme court of Oregon in the case of *Kadderly v. Portland*, 44 Or. 118, [74 Pac. 710, 75 Pac. 222], which appears to be the only case in which that question has been directly presented. See, also, *Hopkins v. City of Duluth*, 81 Minn. 189, [88 N. W. 536]. However this may be, it is clear that the direct participation of the electors of subdivisions of a state in legislation as to local affairs was never intended to be prohibited by the framers of the federal constitution, or the states adopting the same, and that such power has been exercised by them, where not inconsistent with provisions of their state constitution, in innumerable instances, from the institution of our government to the present day, without interference of any kind on the part of the federal government.

As is universally recognized by courts and writers on constitutional law, it must be assumed that there was nothing in any of the forms of government prevailing in the various states at the time of the adoption of the constitution that was violative of the provisions under discussion. Discussing this question, and speaking of the forms of government then existing in the various states, the supreme court of the United States said, in *Minor v. Happersett*, 21 Wall. 162, 175, 176; "These governments the constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the constitution." It is unnecessary to here do more than to refer to the widely known and well-recognized form of local government that prevailed in several of the states at the time of the adoption of the constitution, known as the New England town government, under which all the inhabitants in town meeting directly exercised such legislative power as was essential to the conduct of local affairs. No difference material to the objection under discussion is to be found in the fact that they did this in public meeting, rather than by secret ballot at the polls, as under the provision before us. The objection here made is that, under the republican form of government guaranteed by the federal constitution, such power cannot be directly exercised by the people, and, so far as that objection is concerned, if the people may legislate directly in town meeting, they may do so by their votes at the polls. The constitutional provision was framed and adopted with full knowledge of this system of local government that then obtained in four of the states, and that system was continued under the constitution, without any question as to its validity. It is still to be found not only in several of the New England states, but also in other states (see 1 Bryce's

American Commonwealth, pp. 594, 601, 605; 1 Dillon on Municipal Corporations, sec. 258), and we are not aware that any suggestion has ever been made that this form of local government is prohibited by the federal constitution. Other instances practically without number of the direct exercises of legislative power by the people in local affairs authorized by the state might be noted. As suggested in the briefs, the forms of local government in this country have been most varied, running all the way from the pure democracy of the town meeting form of government up to such absolute control by the legislature of the state as deprived communities of any voice in local affairs. It is apparent from this condition of affairs, existing continuously from the moment of the adoption of the constitution, that, if there is anything therein inconsistent with a republican form of government, within the meaning of these words as used in the federal constitution, the constitutional guarantee was intended to apply only to the form of government for the state at large, and not at all to the local government prescribed by the state for its municipalities and other subdivisions.

Whatever may be said as to the former, the latter is undoubtedly true. It is clearly a question of local policy with each state what shall be its various political subdivisions for purposes of internal government, and what shall be the extent and character of the powers of those subdivisions and the manner of their exercise. The power of a state in such matters is absolute. See *Clairborne v. Brooks*, 111 U. S. 400, [4 Sup. Ct. 489]; *Forsyth v. Hammond*, 166 U. S. 506, [17 Sup. Ct. 665]. Where the authority of the electors of a municipality or other subdivision of a state to directly legislate in a matter of purely local concern is denied by a state court, it is denied solely upon the ground that the state constitution or statutes forbid the exercise of such power, as in *Elliott v. Detroit*, 121 Mich. 611, [84 N. W. 820], and many cases cited by petitioner. See Cooley on Constitutional Limitations, 7th ed. pp. 165, 166; Dillon on Municipal Corporations, sec. 44 and note. The extent to which the people of a municipality shall be allowed to directly participate in the governmental function of legislating in local or municipal affairs is therefore purely a question of state policy, in the determination of which the state is not restricted by any provision of the federal constitution. In thus speaking of the state, we mean not the legislature of the state, or the executive, or the judiciary, but the entire body of the people, who together form the body politic, known as the "state" *Pankhallow v. Doan's Admr.*, 3 Dall. 93, [Fed. Cas. No. 10,925]; *Brown v. State*, 5 Colo. 499.

MCFARLAND, J., dissenting.¹

¹ "The provision for the so-called initiative and referendum in regard to the adoption of ordinances is not unconstitutional. Legislation in towns, by by-laws, in regard to subjects strictly of local concern, has been a part of the law of Massachusetts from the earliest times. *Opinion of the Justices*, 160 Mass. 586, 590. Whether such legislation shall be inaugurated by the people, or entirely by a representative

Because it does not apply to local govt.

COMMONWEALTH ex REL. McCURDY v. LEECH. 37

1868. 44 Pa. 332.

LOWRIE, C. J. This is a writ for a quo warranto to try the title of the defendant to the office of common councilman of Philadelphia, which office the relator claims to belong to him.

The allegations are that the election returns show that the relator was elected, and that he duly received a certificate of his election from all the return judges; that by a fraudulent combination with some of the return judges, the defendant obtained from a majority of them a like certificate in his favour, and afterwards falsely and fraudulently declared that he would not use it, and after thus inducing the relator not to commence proceedings to prevent the use of it, he fraudulently combined with others to use it, and thereby obtained his seat in the council, and still holds it.

Do these allegations raise a case that this court is authorized by law to decide? We are very sure that they do not. It is very plainly a case where there are two claimants for the very same office, which only one of them can have; and therefore it is a case of a contested election, and must be tried in the mode that is specially provided for such cases, and not by the ordinary forms of judicial process. This has been so often decided of late years that we supposed it was generally understood. It is a well-settled precept of the common law and of common sense that where a statutory remedy is given with a statutory right, the common law remedies are withheld, and this principle is embodied in the Act of 21 March, 1806, which is very familiar in practice.

The mode of trying contested elections of councilmen of Philadelphia is written in the Charter Act of 1854, and is the same as is provided for contested elections of members of the Senate and House of Representatives. We need not describe what that is, for it is well known that it is by a committee of the body in which the seat is claimed, and that the courts have nothing to do with it.

Does the allegation of fraud in the election, or in the conduct of the return judges, or of any of them, or in the conduct of any of the candidates in procuring votes and obtaining the certificate of election, give rise to any other remedy? No, certainly not; for all these are matters that can be fully tried in the special mode provided by the statute, and all of these are intended to be tried in that way. It would

body or board of officers, is a matter of regulation in regard to which our Constitution is silent. It is therefore for the General Court to determine by enactment. The provisions of the Constitution which forbid the adoption of the so-called initiative and referendum in general legislation do not extend to the making of by-laws and ordinances by towns or cities under the authority of the Legislature, in regard to subjects of local concern. *Opinion of the Justices*, 160 Mass. 588, 589." KNOWLTON, C. J., in *Graham v. Roberts*, 200 Mass. 152, 158.

be quite absurd to suppose that the legislature had provided a mode of trying contested elections, and that by it the frauds that may occur, or be charged to have occurred in them, or in any part of the process of the election, cannot be tried. It would be quite absurd to say that the legislature has given the mode of trying title to an office, which cannot try whether the title of either party is tainted with fraud, for then the mode provided would almost always be inadequate and fruitless. The authority that tries the title must have authority to try all warrants ~~that are made for or against it that are necessary to the decision.~~

Does the warrant that the relator was thrown off his guard by the defendant's declaration that he would not use his certificate, and thus failed to apply to court to prevent the defendant from using it; does this make a case that the court is authorized to hear and decide? Clearly not. We do not say that any court could have lawfully interposed. But if it could, it is not at all averred that the defendant made use of any language to the relator, or of any language or other acts to any person for the purpose of misleading or deceiving the relator, or inducing him to neglect his rights, and therefore there is no valid averment of fraud, though the word fraudulently is very often used.

And moreover, it has already appeared to us that it was not at all because of some misunderstanding by the defendant that the relator failed to claim his right at the proper time and place, but because he himself had combined with others, forming and endeavouring to maintain an irregular organization of the council, and admitting to seats in it persons who were charged to be without title. Had he not done this, he would have presented his certificate in proper time and before the proper authorities, and his claim would have been regularly heard, and we must presume it would have been rightly decided. We have no right to suspect the contrary.

We cannot of course draw to this court jurisdiction of the case on the ground of the allegation that the defendant presented a fraudulent certificate, and was fraudulently admitted on it; for if we should do this on such grounds, we should open the way for the admission of all cases of contested election, and should be fairly chargeable with usurpation.

The argument went a little out of the case presented by the information, in referring to the other disputed seats in the same council, and in alleging that unless we interfere, the political party, which in right is entitled only to a minority of members, will have a majority of them, and will therefore have the control in the election of city officers.

If this be so, it is much to be regretted, but we have no authority to inquire of the fact. It must be very plain to every thinking mind that there is nothing in this suggestion that tends to prove that the court has any authority to interfere. Where the whole duty of judging of any matter is committed to others, it would be sheer usurpation for us to take the decision out of their hands. Plain morality forbids it.

The evil complained of can be only transient, but it is not so with the decisions of this court — they live after us. They stand recorded as examples to be followed in the future. And we desire it to stand as an example that we judge no man in matters wherein we are not authorized to judge him; that we assume no authority not given to us by the constitution and laws, even to effect a purpose that may appear greatly beneficial. We do good when we exercise a vested authority in the correction of wrong, though we may sometimes perform our duties erroneously. We do evil when we usurp authority even in order to do good. If the election law is defective, the legislature is competent to amend it; we cannot do it. And if we set aside the law of the land in order to effect a purpose, we become merely arbitrary.

The motion is discharged, at the costs of the relator.

PEOPLE EX REL. FURMAN v. CLUTE. 38

1872. 50 N. Y. 451.

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming in part and reversing in part a judgment entered upon the decision of the court upon trial at Special Term. Reported below, 42 How. Pr. 157.

This action was brought to oust defendant from the office of superintendent of the poor of the county of Schenectady and to put relator in possession.

At a city election held in April, 1871, said Clute was duly elected supervisor of the fifth ward, accepted the office, and discharged its duties until the 12th day of December, 1871, when he resigned.

At the general election in 1871 the office of superintendent of the poor was to be filled by the electors of the county of Schenectady. The relator, Furman, and the defendant, Clute, were both candidates for said office, and were voted for by the electors. The whole number of votes was 4,676, of which Clute received 2,448 votes and Furman 2,228. Of the votes given for Clute, 295 were given in the fifth ward of the City of Schenectady, which then constituted one election district. Clute was declared elected, and having filed his official bond and taken the oath of office, he on the first day of January, 1872, entered into said office and still continues therein.

Previous to January 1, 1872, the said Furman took the oath of office and tendered and deposited with the county clerk a bond in due form and sufficiency as superintendent of the poor of said county, and claimed the said office.

There was no proof of actual notice of Clute's ineligibility to any of the electors of said county, nor proof of any facts from which notice could be implied other than his holding the office of supervisor of the fifth ward.

The Special Term decided that defendant was disqualified from holding the office; that his election was void, and conferred upon him no title to the office; that there being no proof of notice to the electors of such disqualification nor of facts from which knowledge or notice could be presumed, neither of the candidates acquired title to the office, and the election was a failure. It thereupon ordered judgment ousting the defendant from the office without costs to either party. Judgment was entered accordingly. The General Term affirmed the judgment so far as that defendant be ousted from the office, but reversed it so far as it adjudged that the relator was not entitled to the office, and directed judgment that he is so entitled, and gave him his costs.¹

FOLGER, J. The first question to be considered on this appeal is whether Clute was eligible to the office of superintendent of the poor. [This point was discussed and decided in the negative.]

The second question to be considered is whether Furman, the relator, was, at the general election of 1871, duly elected to the office. Neither a majority nor a plurality of all the ballots found in the boxes were for him. He had but a minority of them.

It is the theory and the general practice of our government that the candidate who has but a minority of the legal votes cast does not become a duly elected officer. But it is also the theory and practice of our government, that a minority of the whole body of qualified electors may elect to an office, when a majority of that body refuse or decline to vote for any one for that office. Those of them who are absent from the polls, in theory and practical result are assumed to assent to the action of those who go to the polls; and those who go to the polls, and who do not vote for any candidate for an office, are bound by the result of the action of those who do; and those who go to the polls and who vote for a person for an office, if for any valid reason their votes are as if no votes, they also are bound by the result of the action of those whose votes are valid and of effect. As if, in voting for an office to which one only can be elected, two are voted for, and their names appear together on the ballot, the ballot so far is lost. The votes are as if for a dead man or for no man. They are thrown away; and those who cast them are to be held as intending to throw them away, and not to vote for any person capable of the office. And then he who receives the highest number of earnest valid ballots, is the one chosen to the office.

We may go a step further. They who, knowing that a person is ineligible to office by reason of any disqualification, persistently give their ballots for him, do throw away their votes, and are to be held as meaning not to vote for any one for that office. But when shall it be said that an elector so knows of a disqualification rendering ineligible the person, and knowing, persistently casts for him his ballot? There

¹ Arguments and part of opinion omitted.—En

41
 When election
 charged with
 notice of
 disqualification

may be notice of the disqualifying fact, and of the legal effect of it, given so directly to the voter, as that he shall be charged with actual knowledge of the disqualification.

There may be a disqualifying fact so patent or notorious, as that knowledge in the elector of the ineligibility may be presumed as matter of law. In modern times LORD DENMAN, C. J., thus puts a case: "No one can doubt that if an elector would nominate and vote only for a woman to fill the office of mayor, or Burgess in parliament; his vote would be thrown away; there the fact would be notorious, and every man would be presumed to know the law upon that fact." *Gosling v. Veley*, 7 Ad. & Ell., N. R., 406-439; 53 Eng. Com. Law, 406. In the same case, the learned judge says that "the result of the decisions appears to be this: where a majority of electors vote for a disqualified person, in ignorance of the fact of disqualification, the election may be void or voidable, or, in the latter case, be capable of being made good according to the nature of the disqualification. The objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available; or it may be such as to place the elected candidate on the same footing as if he never had existed, and the votes for him were a nullity." And then, referring doubtless to the *viva voce* manner of voting in England, and to the manner of keeping of poll-books there, and to the fact of the number of electors there being small, so that for whom each elector has voted is known, and he may be safely allowed to recall his vote for an ineligible person, and give it for another eligible, the learned judge continues: "But in no such case are the electors who vote for him deprived of their vote if the fact becomes known and is declared while the election is still incomplete. They may instantly proceed to another nomination and vote for another candidate. If it be disclosed afterward, the party elected may be ousted and the election declared void; but the candidate in the minority will not be deemed *ipso facto* elected. But where an elector, before voting, receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchises."

Notice of fact
 must both
 be given

To which we add, that not only must the fact which disqualifies be known, but also the rule or enactment of law which makes the fact thus effectual.

In the multitude of cases in which the question has arisen, we think that up to this point, there is no essential difference of result. All agree that there must be prior notice to, or knowledge in the elector of fact and law, to make his vote so ineffectual as that it is thrown away. But some say that if there be a public law, declaratory that the existence of a certain fact creates ineligibility in the candidate, the elector having notice of the fact, is conclusively presumed in law to have knowledge of the legal rule, and to be deemed to have voted in persistent disregard of it. Others deny that the maxim, "*Ignorantia*

Elect. who
 know
 law
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 fact

juris excuset neminem" (even with the clause of it, "*quod quisque scire tenetur*," not often quoted, and of which we are reminded by the very thorough brief of the learned counsel for the relator), can be carried to that length, and insist that there does not apply to this question the rule that all citizens must be held to know the general laws of the land, and the special law affecting their own locality.

That maxim, in its proper application, goes to the length of denying to the offender against the criminal law a justification in his ignorance thereof; or to one liable for a breach of contract, or for civil tort, the excuse that he did not know of the rule which fixes his liability. It finds its proper application when it says to the elector, who, ignorant of the law which disqualifies, has voted for a candidate ineligible, your ignorance will not excuse you and save your vote; the law must stand, and your vote in conflict with it must be lost to you. But it does not have a proper application when it is carried further, and charges upon the elector such a presumption of knowledge of fact and of law as finds him full of the intent to vote in the face of knowledge, and to so persist, in casting his vote for one for whom he knows that it cannot be counted, as to manifest a purpose to waste it. The maxim itself concedes that there may be a lack of actual knowledge of the law. For it is *ignorance* of it which shall not excuse. Then the knowledge of the law, to which each one is held, is a theoretical knowledge; and the doctrine urged upon us would carry a theoretical knowledge of the statute further than goes the statute itself. The statute but makes ineffectual to elect the votes given for one disqualified. The doctrine would make knowledge not actual, of that statute thus limited, waste the votes of the majority, and bring about the choice to office by the votes of a minority. We are not cited to nor do we find any decision to that extent of any court in this State. The industrious research of the learned counsel for the relator has found some from courts in sister States. *Gulick v. New*, 14 Ind. 97 is to that effect. *Carson v. McPhetridge*, 15 id. 331, follows the last cited case. *Hatcheson v. Tilden*, 4 Har. & McH. 279, was a case at *nisi prius*, and is to that effect. With respect for these authorities, we are obliged to say that they are not sustained by reasoning which draws with it our judgment. *Commonwealth v. Read*, 2 Ashmead, 261, is also cited. But that was a case of a board of twenty, assembling in a room to elect a county treasurer. On motion being made to elect *viva voce*, a protest was made that the law under which they were acting prescribed a vote by ballot. Thus actual notice of law and fact was brought directly to each elector before voting. Nineteen persisted in voting *viva voce*. These were held to be wasted votes. One voted by ballot; and his vote was held to prevail, and the person he voted for to be elected. *Commonwealth v. Clutey*, 56 Penn. St. Rep. 270, is also cited. But the language of the court there is: "The votes cast at an election for a person who is disqualified from holding an office are not nullities. They cannot be rejected by the inspectors, or thrown out of the count

different
changed with
to show purpose
to waste vote

by the return judges. The disqualified person is a person still, and every vote thrown for him is formal." And that was the case of one who was ineligible by reason of having held the office of sheriff of a county, and became a candidate in the same county for the same office before the lapse of time prescribed by the Constitution; a case in its facts quite like this in hand.

The relator also cites many instances of the action of legislative bodies and their committees. As to these, a respectable authority on these questions has remarked, "that they cannot be said to afford any precise or useful principle," 1 Peckwell, 500; and learned counsel, arguing in support of the principle now claimed by the relator, has conceded that "no fixed principle is established by the decision of committees," *Galway Election Cases*, 2 Moak. Eng. Cases, 714; and it may safely be said that they are not so conclusive and satisfactory as judicial determinations, as it is difficult to arrive at the exact principle upon which the votes of so many as constitute a legislative body are put. Besides that, they are not uniform, but quite diverse in their results, as appears from the citations of the counsel of the relator, and the instances noted in 56 Penn. St. Rep., *supra*.

We have consulted many of the authorities cited to us from the English books; and in them it will be found, we think, that where it was held that votes for an ineligible person would be treated as thrown away, it was not extended beyond cases in which there was actual notice of fact and of law to the voters before their votes were cast. *Gosling v. Veley*, *supra*; *Rex v. Hawkins*, 10 East. 211; *Claridge v. Evelyn*, 5 Barn. & Ald. 81; Douglass, 398 n. [22]; *Rex v. Parry*, 14 East. 549; *Rex v. Bridge*, 1 Maule & Selw. 76.

And there are American authorities which hold that if a majority of those voting by mistake of law or fact happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him in poll shall receive the office. *Saunders v. Haynes*, 13 Cal. 145; *State v. Giles*, 1 Chand. [Wis.] 112; *State v. Smith*, 14 Wis. 497. And in Dillon on Mun. Corp. p. 176, §185, it is stated that unless the votes for an ineligible person are expressly declared to be void, the effect of such person receiving a majority of the votes cast is, according to the weight of American authority and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be had, and not to give the office to the qualified person having the next highest number of votes. And this view is sustained by a preponderance of the authorities cited by the author in the foot note, some of which are cited above. And in *The Queen v. Mayor, etc.*, 3 Law Rep. [Q. B.] 629, after holding that though the electors had actual notice of the fact which had been adjudged by the courts to disqualify, yet knowledge or notice in the elector of the adjudication could not be presumed. It is further said: "It is not enough to show that the voter knew the fact

only; but it is necessary to know sufficient to raise a reasonable inference that he knew that the fact amounted to a disqualification. It cannot be said in all cases that the mere knowledge of a fact, which in law disqualifies a candidate, must be taken to be knowledge of all accompanying circumstances."

We think that the rule is this: the existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a wilfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied.

To state a truism; our theory of government by the people is upon the assumption that the people as a whole are intelligent of their rights and interests, and are honestly and earnestly concerned in the due and wise administration of affairs, and zealously alive to the need of good and fitting men in the various places of public trust, and hold in high esteem the privilege of suffrage, and are unready to pretermitt its exercise or to exercise it meaninglessly. It is much to presume, with this as our starting point, that any considerable body of electors will purposely so exercise their right of electing to office as that it shall be but an empty form; and that going through with outward signs of an election they will of intent so cast their ballots, as that they will be votes wasted.

Now the finding in this case is, that there was no proof of actual notice of Clute's ineligibility, nor of any facts from which notice could be implied, save that he was a supervisor.

There was but this fact, and the law upon the statute book; sufficient in themselves, as we hold, to render him ineligible.

But therefrom to give the office to the relator, it is first to be presumed, as a matter of law, that near 300 of those who voted for Clute had knowledge of the fact that he was supervisor; had knowledge of the existence of the act of 1853; and knew that, the fact and the law concurring thus, he was ineligible to receive and avail himself of their votes in his favor, and knew that their votes given to him were wasted, without effect upon the count.

It is to be presumed further, that knowing this, they all, though seemingly desirous of taking an effectual participation in the choice of a person to the office of superintendent, deliberately so acted as that they are assumed to have persisted against knowledge; determined to "do nothing but tender their vote for him."

It is not in accordance with common sense, and we find no rule or authority so stringent as to compel us to that result.

Rule

Notice given
to electors
that Clute was
ineligible

Since the fact that Clute was a supervisor was known to the electors, and they voted for him, the fact that he was a supervisor is not a defense to the charge of fraud.

There is one other question remaining. The act of 1829 says that no supervisor shall be appointed *to hold* the office, etc ; and the act of 1853 says that no supervisor shall be elected or appointed *to hold* the office, etc.

The learned and ingenious counsel for the defendant urges that the manifest intention of the legislature was to inhibit, not the *election* or appointment to the office of superintendent, but the *holding* of the two offices by the same person. And from this he deduces the proposition that when Clute accepted the office of superintendent he vacated that of supervisor, and could continue to hold the former.

We do not so think. The legislature intended that the same person should not hold the two offices at the same time ; and to effect this, it prohibited the election of a supervisor to hold the office of superintendent. It made him ineligible, not merely to holding, but to an appointment or election to hold.

The language is not that he shall not hold, but that he shall not be elected or appointed to hold, and operates upon the very first step in the process toward holding, and stops that. He can never hold but by appointment or election ; and the act says that he shall not be eligible to that election or appointment. So that he never can begin to hold, and cannot, by resigning the one or accepting the other, bring himself within the reason of the cases cited, of which *The People v. Carrique*, 2 Hill, 93, is one. There the defendant was held to be eligible to the office which he accepted ; but as that was held to be incompatible with the one which he already filled, his acceptance of the last *ipso facto* vacated the first.

We are therefore of the opinion that the judgment of the General Term should be reversed, and that of the Special Term affirmed.

All concur.

*Judgment accordingly.*¹

IN THE MATTER OF THE MAYOR &c. OF NEW YORK. 37

1908. 193 N. Y. 503.

WERNER, J.² . . . Counsel for the appellants insist that the ice company never acquired a valid title to the right to build and maintain a pier because the resolution of the common council of the city of New York authorizing the grant was never legally adopted. The grant was made in 1862. At that time the common council was composed of two branches, one of which was designated as the board of aldermen, consisting of one alderman elected from each ward for a term of two years, and the other of which was called the board of assistant aldermen, consisting of one assistant alderman from each ward elected for a term of one

¹ See *State v. Freer*, 144 Wis. 79.

² Part of the opinion only is given. — En

year. These two bodies were vested with concurrent powers, which were exercised in separate sessions at different times, each body having the right to amend, reject or concur in any ordinance or resolution by a majority vote of the members elected. The charter also provided that there should be no joint committees of the council, except a committee on accounts.

This was the condition of the charter on the 18th day of November, 1851, when the board of aldermen adopted the following resolution:

"Resolved that the pier, foot of Forty-third street, to be sold to Caleb Lindsley, that the Commissioners of the Sinking Fund fix the price to be paid therefor, the counsel to the corporation to prepare the necessary deeds, and the proceeds thereof to be deposited in the City Treasury to the credit of the Sinking Fund for the redemption of the City debt." This resolution was adopted by the board of assistant aldermen on the 16th day of April, 1852, and approved by the mayor

on the 19th day of April, 1852. It is the contention of counsel for the appellants that this resolution never became effective to authorize the grant to Lindsley because it was not adopted by both branches of the council in the same year, and the case of *Wetmore v. Story*, 22 Barb. 414, is cited to support it. In that case the controversy was over the validity of a street railroad franchise granted under the same charter. There, as here, one branch of the common council adopted in a given year the resolution authorizing the grant, and the other branch of the common council adopted the resolution in the following year. In passing upon the validity of that grant the Supreme Court of this state expressed the view that there was a strict analogy between the common council thus constituted and a national or state legislature composed of two co-ordinate branches; and that no act, ordinance or resolution of either branch can be valid without the concurrence of both of the bodies as constituted when the particular measure originates in either branch. It is not to be denied that there is a certain analogy between the Federal and state legislatures on the one hand, and the similarly constituted municipal legislatures on the other, but it is an analogy that can only be carried to the point where practical considerations essentially differentiate national or state legislatures from similarly constituted common councils, the co-ordinate branches of which may meet at the same time or at different periods, and whose work is of such a character that it can neither be all initiated or finished at any particular time or place of meeting, or during the continuance of any particular membership. The co-ordinate branches of the common council of the city of New York, as constituted in 1851-1852, had the power to meet at the same time or at different times. The sessions of these bodies, whether held together or at separate periods, were continuous in the sense that they were not confined to a stated term which could only be brought to a close by concurrent adjournment. Some of these transactions were obviously and necessarily to be transmitted to and finished by their successors. This is one of the

Resolution not
ad p. 11, B. 1.
Branches of council
in same year.

Analogy
+ 1/2

fundamental differences between this common council and the state legislature. The State Constitution of 1846, which was in force in 1851 and 1852, contained the provision that "if any bill shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Legislature shall, by their adjournment, prevent its return; in which case *it shall not be a law.*" The then existing provisions of the city charter were radically different. That statute declared that "If any ordinance or resolution passed by each board . . . shall not be returned by the mayor within ten days (Sundays excepted) after it shall have been presented to him, the same shall become a law, in like manner as if he had signed it, unless the close of the session of the common council shall prevent its return, in which case it shall not be a law, until the expiration of five days, after the commencement of the next session of the common council, by whom the ordinance or resolution shall be reconsidered if returned within such time, and be disposed of in the same manner and with like effect as if presented at the preceding session." L. 1849, ch. 187, sec. 6. This sharp contrast between the phraseology of the Constitution and of the statute is significant. The language in the charter was evidently used to meet the very situation that must have been anticipated with reference to a dual common council sitting in separate divisions on different days when there might be unfinished business at "the close of the session of the common council." The "close" referred to was obviously not the adjournment of one of the co-ordinate bodies on a particular day to another specified time, but the "close" of the year when newly-elected members came in. It seems to have been intended that despite such changes in membership all pending matters were to be disposed of "with like effect as if presented at the preceding session." It is true that the precise point here at issue is not provided for in express terms in the charter, but the language quoted seems clearly to recognize the continuity of the common council and to authorize the conclusion of the business of that body which had its inception in previous sessions or years. This has been the generally accepted view of this and similar municipal charters in this state. For more than half a century the city of New York has proceeded upon this theory, and other municipalities have followed her example. If we were now to adopt the radical change contended for by the appellants, it would throw our municipal governments into great confusion and result in a disturbance of property rights that would entail incalculable loss to many innocent individuals and corporations. The idea may be very cogently illustrated by an example even more simple than that presented by the facts set forth in this record. By far the larger number of our cities have common councils composed of a single board of aldermen elected for one or two years, as the case may be. If such a body is not continuous, and terminates whenever membership is changed by election, it must follow that all matters not

not to be
initiated
in previous
sessions

finished at such times die with the particular membership which originated them, and must be commenced *de novo* with every change in the personnel of the body. It will readily be perceived that the situation is one in which the logic of theory must give way before the necessities of practicalness.

It is familiar knowledge that municipal legislatures have to deal with many matters, such as the building of sewers, the installation of water works, the paving of streets and the laying out of parks which originate under one membership, are carried on by still another, and are finally finished by yet another. The exigencies of practice have made this course necessary, and by common consent it has been followed. Relying upon its validity tax rolls have been confirmed, bonds have been issued, and an infinite variety of rights and obligations have been created. A present judicial determination, based upon the theoretical views which governed the decision in *Wetmore v. Story*, *supra*, would result in a condition of chaos beyond description. These are but a few of the considerations which render it impossible for us to follow the decision in that case.

Continued
P. 165.

PEOPLE EX REL. GERMAN INSURANCE CO. v. WILLIAMS.

1893. 145 Ill. 573.

SHORE, J.¹ The principal question presented is, whether *mandamus* will lie to compel acceptance of a municipal office by one who, possessing the requisite qualifications, has been duly elected or appointed to the same.

It is stated by text writers, that no case has arisen in this country involving this precise question (Merrill on *Mandamus*, sec. 145; Dillon on *Mun. Corp.*, sec. 162), and in the researches of counsel, and our own examination, none have been found. There are, however, a number of cases where analogous questions, involving the same principle, have been elaborately discussed and determined in the State and federal courts. Very many English cases are found, in which it has been held that it was a common law offense to refuse to serve in a public office, to which one had been elected or appointed under competent authority; and that *mandamus* will lie in such case to compel the taking of the official oath, and entering upon the discharge of the public duty. It is objected that these cases do not show that *mandamus* would lie for the refusal to accept public office, prior to the fourth year of James the First. If the contention be true, it is unimportant whether the particular remedy was by *mandamus*, by the ancient common law, or not. The important subject of inquiry is, whether it was a common law duty to accept and discharge the duties of a public municipal office. The writ of *mandamus* was in use as early as

See also...

¹ Statement of facts and part of the opinion omitted. — Ed.

the 14th and 15th centuries. *Rez v. Cambridge University*, Fort. 202; *Rez v. Dr. Gower*, 3 Salk. 280. It appears from *Dr. Widington's* case (A. D. 1678), 1 Levinz, 23, that *mandamus* had been in use as early as in the times of Edward 2d and Edward 3d, between 1307 and 1377.

Originally it was a letter missive from the sovereign power, commanding the party to whom it was addressed to perform the act or duty imposed. Later it obtained sanction as an original writ, emanating from the King's bench, where, by fiction of law, the King was always present. But it does not seem to have been frequently used, nor adopted as the remedy to compel the acceptance of office, until late in the 17th century. In modern times the uses of the writ, and the purposes to which it will be applied, has been greatly enlarged, and it has come into general use wherever there is a legal duty imposed, and no other remedy is provided by law for a failure to discharge it, and in many other cases against those exercising an office or franchise, where there may be another remedy, but it is less direct and effective. In this State, as in most, if not all, the States of the Union, the proceeding is regulated by statute. Ch. 87, R. S.

The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of and to supply the defects of the common law prior to the fourth year of James I. (excepting certain statutes), and which are of a general nature and not local to that kingdom, are, by our statutes, made the rule of decision until repealed by the legislature. Thereby the great body of the English common law became, so far as applicable, in force in this State.

It is held in numerous English cases, that by the common law it was the duty of every person having the requisite qualification, elected or appointed to a public municipal office, to accept the same, and that a refusal to accept such office was punishable at common law.

[The court here examined a number of English cases and other authorities.]

It follows, necessarily, that if to refuse the office is a common law offense, and punishable as such, that a legal duty attaches to the person to take upon himself the office, which may now be enforced by *mandamus*.

While offices of this class, in England, were accepted as a burden, they have not been generally so regarded in this country. Under our system of local government, even the smallest offices are generally accepted, either because they are supposed to lead to those which bring higher honors and greater emoluments, or because of a sense of duty. To this fact, and perhaps to the prevalent but mistaken idea, that one holding a public office may resign at will, may be attributed the want of decision in this country upon the precise question at issue. The cases bearing upon this question, in this country, have ordinarily arisen, where the incumbent has sought to resign from public office.

Refusal to
accept office
punishable at
C.L.

And it has been uniformly held, that the power to resign did not exist, or resignation become effective to discharge the officer from the public duty, until accepted by lawful and competent authority. In *Edwards v. United States*, 103 U. S. 471, Edwards had been elected supervisor of the town of St. Josephs, Berrien county, Mich., on April 8, 1876, and entered upon the duties of his office, and on the 7th of June following, resigned, in writing, and filed the same with the town clerk. No action was alleged to have been taken by the township authorities, and the question was: "Was the resignation complete without an acceptance of it, or something tantamount thereto, such as the appointment of a successor." The court holds that it was not, and says: "In England a person elected to a municipal office was obliged to accept it, and perform its duties, and he subjected himself to a penalty by a refusal. An office was regarded as a burden, which the appointee was bound, in the interest of the community and good government, to bear." And it is said, that it followed from this, as a matter of course, that after the office was assumed, it could not be laid down at will. And that court holding that the common law rule prevailed in Michigan, the judgment awarding a peremptory writ, compelling the performance of the duty, as supervisor, etc., was affirmed.

In the case of *Hoke v. Henderson*, 4 Dev. (N. C.) 1, it is said, in passing upon the question there at issue: "An officer may certainly resign, but without acceptance his resignation is nothing, and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both." And after saying that the acceptance of resignations, in respect of lucrative offices, has been so much a matter of course that it has become the common understanding that to resign is a matter of right, but the law is otherwise, it is said: "The public has a right to the service of all the citizens, and may demand them in all civil departments as well as the military." In *The State v. Ferguson*, 31 N. J. L. 107, the question was, whether the respondent, at the time of the service of the writ of *mandamus*, was an overseer of highways, etc. The respondent proved that before the service of the *mandamus* he had sent in his resignation of said office, on which certain of the township committee had endorsed acceptance. It was insisted that the officer had a right to resign at will, and that the mere notification of the proper officers, of the fact, relieves him from performance of the official duty. The Chief Justice, after reviewing the common law authorities, says: "I think it undeniable, therefore, that upon general principles of law, as contained in judicial decisions of the highest authority, the refusal of an office" of the class to which the one under consideration belongs, was an offense punishable by a proceeding in behalf of the public. Regarding, then, the doctrine of the law as established, it seems to be an unavoidable sequence that the party elected, and who is thus compelled by force of the sanction of the criminal law to accept the office, cannot afterwards resign it *ex mero motu*. If his recusancy to accept can be pun-

No power to
resign from office,
until resignation is
duly accepted.

Resignation not
complete without
acceptance.

Common
understanding
wrong

ished, it cannot be that he can accept, and immediately afterwards, at his pleasure, lay down the office. The same principle has been more or less directly announced in *Van-Orsdale v. Hazard*, 3 Hill, 243; *London v. Headen*, 76 N. C. 72; *Winegar et al., etc. v. Roe*, 1 Cowen, 258; *People v. Supervisors Barnett Tp.*, 100 Ill. 382; *Badger v. U. S.*, 98 U. S. 599.

The reason assigned in *Rex v. Larwood*, 1 Salk. 168, for the public duty is, "that the King hath an interest in every subject and a right to his service, and no man can be exempt from the office of sheriff but by act of parliament or letters patent." Under our form of government, the principle applies with even greater force than under a monarchy. In a republic the power rests in the people, to be expressed only in the forms of law. And if the duty, preservative of the common welfare, is disregarded, society may suffer great inconvenience and loss, before, through the methods of legislation, the evil can be corrected. Upon a refusal of officers to perform their functions, effective government, *pro tanto*, ceases. All citizens owe the duty of aiding in carrying on the civil departments of government. In civilized and enlightened society men are not absolutely free. The burden of government must be borne as a contribution by the citizen in return for the protection afforded. The sovereign, subject only to self-imposed restrictions and limitations, may, in right of eminent domain, take the property of the citizen for public use. He is required to serve on juries, to attend as witness, and, without compensation, is required to join the *posse comitatus* at the command of the representative of the sovereign power. He may be required to do military service at the will of the sovereign power. These are examples where private right and convenience must yield to the public welfare and necessity. It is essential to the public welfare, necessary to the preservation of government, that public affairs be properly administered; and for this purpose civil officers are chosen, and their duties prescribed by law. A political organization must necessarily be defective, which provides no adequate means to compel the observance of the obvious duty of the citizen, chosen to office, to enter upon and discharge the public duty imposed by its laws, and necessary to the exercise of the functions of government.

It is admitted by the demurrer, that the respondent was legally appointed town clerk of the town of Mount Morris. The office is connected with, and necessary to, the levy of taxes to carry on the municipal concerns of the town and administration of its local jurisdiction. It is shown, that there was a public necessity, as well as that relators had a private interest in the performance of the duties of that office. No election had been held in the town since the annual town meeting of 1891. Numerous persons had been appointed to said office, but it remained vacant, and the duties, consequently, undischarged. It is admitted by the demurrer, also, that claims against the town, in favor of the relator, to a large amount, had been audited by

Part of burden
of citizen.

the board of town auditors of said town, and allowed, and certificate thereof duly made, as provided by law, but that the same could not be delivered to or filed with the town clerk, because of such vacancy in said office, nor could the aggregate amount thereof be certified to the county clerk of said county, to be levied and collected as other town taxes. It is conceded, that the respondent was eligible to the office; that a vacancy therein existed; that he was appointed conformably to the law, and duly notified thereof. Secs. 1, 2, 3, art. 10, ch. 139, R. S. The statute provides that every person appointed to the office of town clerk, before he enters upon the duties of his office, and within ten days after he shall be notified of his appointment, shall take and subscribe, before some justice of the peace, etc., the oath or affirmation of office prescribed by the constitution, and within eight days thereafter file the same in the office of the town clerk. Sec. 2, art. 9, ch. 139, R. S. Sec. 3 of the same article provides, that if any person elected or appointed to said office shall neglect to take and subscribe the oath, and cause the same to be filed as aforesaid, such neglect shall be deemed a refusal to serve. And sec. 7 of the same article provides: "If any person, elected to the office of . . . town clerk shall refuse to serve, he shall forfeit to the town the sum of \$25.00." One of the special duties enjoined upon a town clerk is: "He shall annually, at the time required by law, certify to the county clerk the amount of taxes required to be raised for all town purposes." Sec. 4, art. 12, ch. 129, R. S. Secs. 127 and 128, of ch. 120, R. S., provide that the county clerk shall determine the rate per cent, upon the valuation of the property of towns, etc., that will produce not less than the net amount of the sums certified to them according to law, to be extended by the county clerk upon the equalized valuation of property in such town, etc. The only mode provided by law by which a tax can be levied upon the property of a town, for the payment of its debts, or current expenses, is by the certificate of the town clerk of the town to the county clerk, as thus prescribed. It is apparent, therefore, that a public necessity exists for the discharge of the public duty.

It is insisted, that the legislature having provided a penalty for the refusal to accept the office, that that remedy is exclusive, and that a payment of the penalty imposed was intended to be in lieu of the service. We cannot concur in this view. The purpose of imposing the penalty, was to enforce the acceptance of the office and performance of its duties, and the statute cannot be construed as intending that the person chosen should be discharged from the duty by payment of the penalty, and thereby the purposes of the creation of the office frustrated, and the public duty remain unperformed. Authorities *supra*. It is to be presumed that, had the legislature intended that the payment of the fine should be in lieu of the service, they would have so enacted, and not having done so, the duty remains, notwithstanding the imposition of the fine or penalty. High, Ext. L. Rem., 334, and *supra*.

It is also insisted, that the demurrer should be sustained for the reason that no demand is averred to have been made upon respondent to accept the office and perform its duties. It is alleged that he was duly forthwith notified of his appointment by the board authorized by law to make the same (sec. 3, art. 10, ch. 139, R. S.), and that he refused and neglected to accept the office. Upon being notified, it was his duty by law to take and subscribe the oath of office, and file the same, and enter upon the discharge of the duties.

Relator was not alone interested, nor did the failure of respondent to qualify affect its interest only. On the contrary, the duty, the performance of which is sought to be enforced, is a public duty, commanded by public law. The case is, therefore, clearly distinguishable from one in which the act sought to be enforced is for the benefit of some private party. In cases of this class no formal demand was necessary as preliminary to the application for *mandamus*. *People ex rel. v. Board of Education*, 127 Ill. 624.

We are of opinion that the respondent ought to be required to accept the office of town clerk of said town, to which he has been duly and legally appointed, to take and file the oath as such town clerk, as provided by law, and to discharge the duties of said office, and a peremptory writ of *mandamus* is awarded accordingly.

Peremptory writ awarded.

WELLES v. BATTELLE. 11/1

1814. 11 Mass. 477.

TRESPASS for taking and carrying away a quantity of iron, the property of the plaintiffs. The defendants justify as assessors for the district of Dover for the year 1808.¹

PARKER, C. J. This case comes up upon an agreed state of facts, referring to the court the question, whether the defendants are liable in this action as trespassers, they having issued a warrant of distress, upon which the property of the plaintiffs was taken and sold for the payment of taxes for the year 1808.

The defendants were duly chosen and legally qualified to act as assessors for the district of Dover in the county of Norfolk, for the year 1808. And they duly and legally assessed the taxes authorized for that year upon real estate within the district, belonging to the plaintiffs, who were associated together by the name of "The Boston Iron and Nail Factory Company," carrying on their business in company under that name in said Dover. The taxes in the bill of assessment and in the tax bill were set to "Ruggles Whiting, agent for the Bos-

¹ Statement of facts, argument and part of the opinion which considers other points taken by the plaintiff are omitted. — ED.

ton Nail Factory," the said Ruggles being one of the company, and publicly known to be their agent.

Several points have been made for the plaintiffs, upon which they contend that the taxes have been illegally assessed, and that the warrant to collect them was unauthorized.

First, they allege that the clerk of the district, and the defendants as assessors, were not duly qualified to act in their several capacities; it not appearing by the records, that they were sworn in the manner prescribed by law. Upon the record of the meeting of the inhabitants in March, 1808, for the purpose of electing the necessary municipal officers, it is stated that Jesse Draper was chosen clerk for the ensuing year; and the word "sworn" was immediately added, without any certificate of his oath. By the same record it also appears that the defendants were chosen assessors; and the words "all sworn into office" were added. After the commencement of this suit, the same person, who acted as clerk in the year 1808, added to the record words sufficient to show that the clerk was sworn by the moderator of the meeting, no justice of the peace being present; and that the assessors were sworn by the clerk on the evening of the day of the meeting. It is stated, that parol evidence exists, that the several officers before mentioned were sworn in the same manner now appearing from the record, as amended by the clerk. — And if the original entry of the clerk is sufficient, or if he had a right to amend the record, in the manner and at the time he did; or if parol evidence is admissible to prove that the officers were regularly sworn into office; — then it is agreed that judgment shall be rendered for the defendants: — unless in some other point the proceeding shall be found to be defective.

We have had frequent occasion to perceive the great irregularity which prevails in the records of our towns and other municipal corporations; and the courts have always been desirous to uphold their proceedings, where no fraud or wilful error was discoverable. Too much strictness on subjects of this nature would throw the whole body politics into confusion. For it cannot be expected that, in all the corporations, persons will be every year selected, who are capable of performing their duty with the exactness which would be useful and convenient. As no town or district officer can lawfully exercise his office, until he is sworn in the manner required by law, pains should be taken to have certificates of the oaths made out by the moderator or justice of the peace, as the case may be; and they should be filed among the papers of the corporation. But when the clerk administers the oath, it is sufficient that he enters it of record in the manner adopted in the present case, when the record was amended. The first entry made by the clerk here was certainly defective; and it may be questioned, whether in a recent transaction it would be held sufficient. But we are of opinion, that the defect is properly cured by the subsequent entry of the existing clerk, he being the same person that officiated at the time of the first entry. A sheriff may amend his return,

Record defective

*Orig. clerk
amended record
after this suit
began.*

*It's can't
be strict re:
irregularity
records.*

*1808
entry by
Jesse Draper*

according to the truth, at any term subsequent to that when the precept is returnable; he being liable for a false return, if he abuses the power. *Anonym.*, 1 Pick. 196. *Adams et al. v. Robinson et al. and trustee*, 1 Pick. 461. *Atkins v. Sawyer*, 1 Pick. 354. *Thacher v. Miller*, 13 Mass. 270. *Commonwealth v. Parker*, 2 Pick. 550. And there is as much reason for a clerk to have this power, although after elections have intervened, if at the time he undertakes to amend he is in office, and amends only what was done by him when he was in the same office before. If he states what is not true, he may be punished for fraudulent conduct in his office; and he will be sufficiently watched by interested parties, to render a deviation from truth neither safe nor easy. In this case it is agreed that the amendment in the record is consistent with the truth of the case. How far parol evidence is admissible to prove that an oath was administered, when no minute appears on the record to prove it, need not now be decided. We do not determine, that a moderator of a town meeting, who is not a certifying officer by law, but is occasionally vested with authority to administer an oath, when no justice of the peace is present, may not aid by his testimony a defective record, in which there is a minute, but an informal one, of his having exercised this occasional authority.

Since can only
amend what was
done while he
was in office
before

STATE EX REL. WELFORD v. WILLIAMS.

42

1908. 110 Tenn. 549.

NEIL, J.¹ This was a proceeding instituted in the chancery court of Shelby county for a mandamus upon the defendant, as mayor of the city of Memphis, to compel him to allow the relator to examine the corporation books of the said city of Memphis with an expert accountant. An alternative writ was issued by the chancellor, to which the defendant responded. Thereupon the relator demanded the peremptory writ on the pleadings as they then stood. The chancellor denied the relief sought, and complainant has appealed and assigned errors.

Handwritten notes:
H. S. S. S.
J. S. S. S.
J. S. S. S.
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J. S. S. S.

We pass, now, to a statement of our conclusions upon the general question of law as to the right of a citizen and taxpayer of a city to make an examination of the books and papers of the city. In stating these conclusions we shall not discuss the authorities above referred to or attempt to reconcile their conflicts. After considering all of these authorities and the whole subject involved, we shall state what we believe to be the sound principles applicable to the matter.

In theory the right of examination is absolute, but in practice it is at last only a matter of discretion, because such application is likely at any time to be refused on the part of the custodian of the books.

¹ Part of the opinion only is given. — Ed.

and papers sought to be examined, and then the right must be enforced by *mandamus*, and this writ is not of absolute right, but merely of discretion, to be awarded only in a proper case; the facts claimed as authorizing its issuance to be judged of in every case by the court, and the writ to be awarded or withheld upon a consideration of all the circumstances presented. So, while the right is, in theory, absolute, yet it is in practice so limited by the remedy necessary for its enforcement as that it can be denominated only a "qualified right."

The right to an examination for a special purpose, as, for example, to obtain specific information to use in a litigation between the applicant and third parties, or between the applicant and the corporation, and the like cases, while not, in principle, standing upon higher grounds, yet is the more easily grantable, because it does not involve so much time, and so much inconvenience to the custodian of the books and papers, and so much interruption of business, as in case of a general examination.

Yet it cannot be doubted, under a state of facts showing it to be important to the public interest that the general examination of the books of a municipality should be had, that the court should allow such examination at the suit of one who is a citizen and taxpayer of the corporation.

The right rests, not only on the ground that the books are public books, but also on the same principle that authorizes a taxpayer to enjoin the enforcement of illegal contracts entered into by the municipality, county, or State, for the protection of the applicant and all other taxpayers from illegal burdens. And it is obvious that, in making and enforcing such application, the taxpayer acts, in a very real sense, not only for himself, but for all other taxpayers, and acts, therefore, in the capacity, as it were, of a trustee for all.

It must be admitted, also, that the exercise of such power, if prudently and carefully guarded, cannot be otherwise than salutary, because the knowledge that it can be exercised by a citizen and taxpayer, and may be exercised when the public good shall seem, on sound reasons, to demand it, cannot result otherwise than in producing an added sense of responsibility in those who administer the affairs of municipal corporations and in inducing a greater carefulness in the discharge of the trusts imposed upon them by their fellow citizens under the sanctions of law.

Yet it is equally true that such general examinations must necessarily to some extent interrupt the ordinary and usual course of business in public offices, and require of the officers in charge thereof some additional duties for the time being. And it follows, from this, that such examinations should not be lightly granted, or permitted with unnecessary frequency; that the occasion should be grave and important; and that the person seeking the examination should be trustworthy and reliable, and at all times and at every stage subject to the supervision of the court, to the end that there may be no op-

Special purpose
inspection
of papers

General
exam. of all
papers

Public utility

Not worth
the trouble
of getting
the records

pression practiced under the guise of doing service to the public, and that the safety of the books and records subjected to the examination shall be continually provided for. All of these matters fall within the principle that the granting of permission to make the examination rests in the sound discretion of the court, in the form of granting or withholding the writ of mandamus.

It only remains to determine whether the occasion shown in the present case is of sufficient gravity to move the discretion of the court.

Circumstances in this case

The case presented, as drawn from the petition and answer, is that the period of the examination sought covers the space of five years, during which time many millions of dollars have been collected by the city administration and expended; that during 1902 there were receipts to the amount of \$1,067,916.09 and disbursements to the amount of \$1,060,053.89, and the city borrowed from one bank \$53,357.04, on which \$3,172.36 was paid, from another bank \$52,135.43, on which \$2,982.17 interest was paid, and from another bank \$22,922.33, on which, \$552.99 interest was paid, aggregating \$135,122.32, and that during the previous year there was borrowed \$101,361; that the taxes collected from year to year from the taxpayers of the city are already very heavy and very burdensome; and that the mayor, notwithstanding the great revenues collected, a liberal exercise of the power to borrow money, and the recent session of the legislature, to which application could have been made for an increase of the means of raising taxes, if the property of the city could bear more, found it necessary, shortly before the petition was filed, to resort to the extraordinary expedient of calling a meeting of two hundred prominent citizens of Memphis to devise ways and means to pave, repair, and "round up" the streets of the city.

Under such a state of facts

Under such a state of facts, we think it not unnatural, and not unreasonable, that the taxpayers of the city should desire to have the books, papers, and vouchers of the city looked into, to the end that they may fully learn the financial condition of the municipality; and we think the facts stated make a case sufficient to justify the court in allowing the general examination sought in the petition.

Indeed the conclusion as to the propriety of making such general examination is substantially conceded in the answer of the defendant, in the fact that he replies that he has set on foot just such examination, through a committee of citizens selected by him and agreed to by the legislative council.

Custodian of books and records

However, the creation of that committee can in no wise interfere with the present proceeding. After judicial proceedings have been started, as in the present case, for the purpose of obtaining a general examination, they cannot be thwarted by the appointment of a committee on the part of the custodian of the books, or his associates in authority, to make an examination in lieu of the one sought. The right of the petitioner to have his application passed upon on its merits became complete upon the filing of the petition, and, of course,

cannot be affected by subsequent acts of the defendant, taken without his consent, and to which he was not a party. It follows that the writ must be allowed, if the defendant is the custodian of the books and papers of the city in such a sense that he can be justly called upon to produce them.

Upon examination of the laws governing the city, and the rights and power of its mayor — as shown in *Watkin's Digest* (1902), pp. 19, 20, secs. 4 and 6; *id.*, p. 22, secs. 1, 2; *id.*, p. 170, art. 5 — we think sufficient powers are vested in the mayor to make it proper that the writ should go against him for the allowance of the examination sought in the petition and for the production of the books and papers.

It results that the decree of the chancellor must be reversed, and the cause remanded for the entry of a decree awarding the peremptory writ; but such decree shall reserve to the court below the powers and control above indicated to prevent oppression, and for the preservation of the books and papers, and to so order the examination as to interfere as little as practicable with the transaction of current business, and said decree shall reserve to each party the right from time to time to apply to the court for instructions pending the examination.

SECTION 2. *Departments.* 43

a. LEGISLATIVE.

LAUNTZ v. PEOPLE EX REL. SULLIVAN.

1885. 118 Ill. 137.

SHELDON, J.¹ Defendant's appointment to the office is admitted by appellee's counsel. The filing of his oath of office is averred in the plea, and not traversed by the replication. It therefore stands confessed by the pleading, so that all there is remaining to give to defendant complete title to the office of city treasurer, is the approval by the city council of his official bond.

There were eight members in the body of the city council; a quorum consisted of five members; the mayor had a casting vote in case of a tie. On the 21st and 29th of May, the council being duly convened, and all its members present, a motion was made to approve defendant's bond, and one-half of the aldermen (four) and the mayor voted to approve the bond, and the other half refused to vote. This action of the city council, it is claimed by appellant, was a valid approval of the bond. On the other hand, it is contended that a majority of the aldermen present (five) should have voted in its favor, to make a valid approval of the bond. In respect of the election of corporate officers,

¹ Statement of facts and arguments, and part of the opinion discussing a question of practice, are omitted. — Ed.

the well settled rule is, as stated in Wilcox on Corporations, sec. 546: "After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting, because their presence suffices to constitute the elective body; and if they neglect to vote, it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote; and such an election is valid though the majority of those whose presence is necessary to the assembly protest against any election at that time, or even the election of the individual who has the majority of votes." And see Angell & Ames on Corporations, secs. 126, 127; *Rez v. Foxcraft*, 2 Burr. 1017; *Commonwealth v. Reed*, 2 Ashm. 261; *State v. Green*, 37 Ohio St. 227. This doctrine is admitted by appellee's counsel, with respect to elections; but they claim that it is limited to cases of elections, and does not extend to the transaction of other corporate business, — that in the latter case a majority of those present must vote for a proposition, to carry it. There is authority for this distinction. Gosling v. Veley, 4 H. L. Cases, 679.

It is further insisted that as the city charter directs the city council "to determine the rule of its proceedings in conformity with the usual practice of deliberative bodies," the parliamentary rule which is adopted by such bodies should obtain, and that that rule requires the vote of a quorum to transact business, and that where the roll is called, and the yeas and nays are taken, and it appears from the response to the call that no quorum is voting, business must be suspended till a quorum answers. We do not find it necessary here to pass upon these positions of appellee's counsel, for, conceding their correctness, we think the admitted rule which applies in cases of elections should be taken to govern in this case of approval of the bond, as being a thing pertaining to the matter of the officer's appointment. The appointment and approval of the bond are both necessary to the investiture of the office. Both are to be by the same body, and we think they may be looked upon as an entirety in investing any one with the office, — that the approval of the bond is a step in the completely filling of the office of city treasurer by the city council, and thus is not other business, but the same business with that of the officer's appointment. What the propriety of separating the proceeding, and requiring another mode of expressing the will of the council in the approving of the bond than in the choosing of the officer? We see not why, properly enough, the same rule may not be held to cover the whole proceeding of the making of the officer, and that the same vote in respect of number of members voting, which admittedly suffices in the case of the election of the officer by the city council, should be deemed sufficient for the approval of the officer's bond. This should be so, unless the authorities forbid. Where the members of the council are equally divided, four voting one way and four the other,

there is a tie, and the mayor may vote with either side, and make a majority. What reason is there why, when all the eight members are present, and four vote and four refuse to vote, the mayor should not vote with one side or the other, and make a majority? Why may it not be considered as equivalent to a tie, counting the members who do not vote as voting the contrary way from the mayor? This would be fulfilling the purposes of the law in giving the mayor a casting vote in case of a tie. It would enable the making of a majority, and prevent the obstruction of business by refusing to act, and would be giving effect to the will of the majority, which is the governing rule in the action of corporations. Angell & Ames on Corporations, sec. 499. What the propriety of giving to a refusal to vote more potency than to a vote cast?—of allowing a gain from violation of duty, in making the refusing to vote of more effect in governing the action of the body of which one is a member, than voting? The charter provision, that where the officer appointed fails to qualify within ten days after receiving notice of his appointment, the office shall be filled by a new appointment, did not render the appointment void on failing to qualify within the time; but such failure was but a cause of forfeiture of the office, which the city council might waive, and they did here waive it, in proceeding afterward in the approval of the bond. *Chicago v. Gage*, 95 Ill. 621; *Cawley v. People*, id. 249.

Can Council
vote on Mayor
as making
majority

Council can
waive failure
to qualify
- 1854

BIGELOW v. HILLMAN. 44

1854. 37 Me. 52.

TRESPASS, *quare clausum*.

The brief statement filed by the defendants set forth, that the *locus in quo* was a common and public highway, etc., and the acts by them done, were what they might lawfully do in passing and repairing the same.

Before the alleged trespass the town of Livermore had discontinued the way, and the plaintiff had enclosed it and put it in a state of cultivation.¹

RICE, J. . . . It is objected that the town meeting at which the vote was passed to discontinue this way, was adjourned to a day subsequent to the time when the plaintiff erected his fences, and subsequent also to the day on which the defendants committed the alleged trespass, by removing said fences, and that said vote could only take effect from the day of the final adjournment of the meeting; because, it is contended, it was in the power of the town, at any time during the continuation of the meeting, to reconsider their vote by which the road had been discontinued.

Town meeting

¹ Arguments and part of opinion omitted. — Ed.

Without considering whether it would be competent for a town to reconsider a vote, after the rights of third parties had intervened, dependent upon such vote, which may well be doubted, it is sufficient in this case, that the vote discontinuing this road was absolute in its terms, and at most, could be liable only to the contingency of being reconsidered at the adjourned meeting. That contingency never happened. The rights of the plaintiff under that vote, if deemed contingent until the final adjournment of the meeting, then became absolute, and related back to the day on which the vote was actually passed.¹

SWINDELL v. STATE, EX REL. MAXEY. 45

1895. 143 Ind. 163.

JORDAN, J. The relators, James W. Maxey and William O'Keefe, instituted and prosecuted this action in the lower court, in the name of the State, to obtain a writ of mandate against the appellant, as the mayor of the city of Plymouth, Marshall County, Indiana, to compel him to recognize each of them as members of the common council of the city, and permit each of them to exercise the duties of the office of councilman. The application for the writ substantially sets forth that on April 25, 1873, Plymouth was incorporated as a city, under and in pursuance of the general laws of the State of Indiana, applicable to the incorporation of cities; that the city upon its incorporation was divided into three wards, and that this division continued until the 27th day of August, 1894, when the common council thereof, being then composed of six councilmen, at a regular meeting, by an ordinance duly passed and adopted at said meeting divided the city into four wards, thereby creating an additional one which was designated as the "fourth ward"; that immediately after creating this ward said council at the said meeting did appoint the relators as councilmen therefrom to fill the vacancies existing in said council by reason of the creation of the additional ward. The due qualification of the relators as members of the council is alleged, and it is charged that the mayor, as the presiding officer of the common council, has refused to recognize them or either of them, and refuses to permit them or either of them, to exercise their rights as such councilmen; and that he had directed the clerk not to call the names of said relators when present upon occasions when it was necessary to constitute a quorum, etc." The application prayed for a peremptory writ of mandate against the appellant, commanding him to recognize the relators as councilmen and to permit them as such to participate in the business of the council and to discharge the duties incumbent upon them as such officers. An alter-

¹ "The right of reconsidering lost measures inheres in every body possessing legislative powers." — WHELPLEY, C. J., in *Jersey City v. State*, 30 N. J. L. 521, 529.

native writ was issued which embodied the facts as alleged in the petition, and required appellant to show cause why the prayer of the relators should not be granted. To this writ appellant unsuccessfully demurred for insufficiency of facts and for a misjoinder of causes of action. An answer in three paragraphs was filed. The first was a general denial. The second alleged, *inter alia*, that the ordinance in question was invalid because it was passed in violation of a certain ordained rule of the common council of said city, which rule it was alleged controlled and governed the proceedings of the common council in the adoption of ordinances, and the rule was made a part of this paragraph. By the third paragraph, appellant sought to assail the verity of the alleged proceedings of the council. The second paragraph of the answer or return to the writ, upon appellee's motion, was struck out and suppressed by the court, upon the grounds that all competent matters therein set up could be given in evidence under the general denial, and for the further reason that the paragraph did not state facts sufficient to constitute an answer or return to the writ. To this ruling an exception was duly reserved. Appellees replied in denial to the third paragraph of the answer, and the issues were in this manner joined between the parties, and the cause was submitted to a jury for trial. At the conclusion of the evidence, the court, at the request of the appellees, instructed the jury to find a verdict in their favor which was returned accordingly.

Over appellant's motion for a new trial, the court adjudged and ordered the peremptory writ to issue as prayed for by the appellees. Various errors are assigned and questions presented and urged by the learned attorney for the appellant, among the first of which is, was the application and alternative writ sufficient in facts to entitle appellees to a remedy by *mandamus*? Upon the theory that the ordinance upon which appellees found their right to exercise the duties of the office to which it is alleged they were duly appointed and qualified, was a valid act of the council, we are of the opinion that this question must be answered in the affirmative. By section 3531, R. S. 1894 (section 3096, R. S. 1881), the mayor is made the presiding officer of the common council, and in a case of a tie has the casting vote. Under section 3497, R. S. 1894, section 3062, R. S. 1881, the duty is enjoined upon him to see that the laws of the State and the by-laws and ordinances of the common council be faithfully executed within the city, and to exercise supervision over subordinate officers and recommend to the common council such measures as he may deem to be for the common good. These are some of the latter officer's duties, among others, prescribed by the organic law under which the city of Plymouth was organized.

From the facts as averred, it appears, at least, that the relators held a *prima facie* title or right to the office which they claimed, undisputed by any other adverse claimant; hence it follows that it was the duty of appellant, as mayor, resulting from his office to recognize the claims of the former and allow them to exercise the duties as members of the

common council, and upon a refusal to discharge this duty they were entitled to institute an action to enforce a performance thereof by a writ of *mandamus*. Section 1182, R. S. 1894 (section 1168, R. S. 1881); *Mannix v. State*, 115 Ind. 245, and authorities there cited; *City of Madison v. Korbly*, 32 Ind. 74. Under such circumstances, it is well settled that the legality and validity of the election or appointment may be inquired into in any proceedings by *mandamus* instituted to compel other persons to recognize the claimant's title to the office, or when he seeks to enter into it or otherwise asserts his rights to act as a duly elected officer. 6 Am. and Eng. Ency. of Law, pp. 384, 385; *Lawrence v. Ingersoll*, 6 L. R. A. 308, and authorities there cited.

Two questions
The two cardinal propositions involved for a decision in this appeal are: First, was the common council of the city of Plymouth authorized by law to adopt the ordinance whereby the additional ward was created, from which the relators were appointed as councilmen? Second, if the council was so empowered, was the ordinance in question legally and validly adopted? We will consider and determine these two questions in their order.

The following facts are established by the evidence in the record: On the 25th of April, 1873, the town of Plymouth was organized as a city, under and in pursuance of the general laws of the State. It was immediately thereafter, under section 3468, R. S. 1894 (3027, 1881), divided into three wards, and its common council thereby made to consist of six members, and this *status* of affairs remained until August 27, 1894, when, at a regular meeting of the council, with all of its six members present, at which meeting the mayor, who was the predecessor of appellant, presided, the city was divided into four wards by an ordinance introduced and adopted at said meeting.

The proceedings of the council after the introduction of the ordinance at the meeting in question prior to and upon its passage, as shown in the evidence given by the appellees, are substantially as follows: "Councilman Reynolds moved that the rules be suspended and that said ordinance be placed upon its passage by one reading. This motion was seconded by councilman Hughes, and thereupon councilman Baily moved to refer the ordinance, as presented and read, to the committee on ordinances and police." A vote upon this motion resulted in a tie. Three of the councilmen voting in favor of the motion and three against, and thereupon the mayor cast his vote in favor of the negative and declared the motion lost. "Councilman Reynolds then, with the consent of his second, withdrew his motion to suspend the rules. Councilman Tibbetts then moved that the rules heretofore governing the proceedings of the council, as printed in the ordinance book, be annulled and repealed." The yeas and nays were taken on this motion to repeal the rules, and the result was that three of the councilmen voted in favor of the motion, and three against, and the vote being a tie, the mayor voted in the affirmative and declared the motion carried. It was then moved by councilman Reynolds that the ordinance,

as read, be placed upon its passage; this vote resulted in a tie, and was declared carried by the mayor casting his vote in favor of the motion. Councilman Tibbetts then moved that the ordinance, as read, be passed and adopted "upon the one reading," and upon the passage of the ordinance the yeas and nays were taken with the following result: Messrs. Hughes, Reynolds and Tibbetts voted for the adoption of the ordinance, and Gretzinger voted against the adoption, and Baily and Tanner were recorded as not voting, and thereupon the mayor declared the motion carried and the ordinance passed and adopted. Councilman Baily then presented a protest against the action of the council, and moved that his protest be placed upon record. Upon the motion of Messrs. Baily, Gretzinger and Tanner voted in the affirmative, and Messrs. Hughes, Reynolds and Tibbetts voted in the negative, and the mayor cast his vote upon the side of the negative, and declared the motion lost. Subsequent to the passage of the ordinance, in which it was declared that the same shall take effect from and after its passage, and at the same meeting the council proceeded to introduce and pass a resolution, whereby the relators were declared appointed and elected councilmen for the said fourth ward, to serve as such until the next general election. Upon the yeas and nays being taken upon the adoption of this resolution, those who voted in the affirmative were councilmen Hughes, Reynolds and Tibbetts. Baily, Gretzinger and Tanner voted in the negative, and the result being a tie, the mayor cast his vote in favor of the resolution, and declared the same adopted; and the relators were thereupon declared elected, and took the required oath of office. Counsel for appellant contend that the action of the council in passing the ordinance dividing the city into wards and thereby forming and constituting the additional one in controversy, was unauthorized, for the reason that the proceedings by the council did not conform to section 3469, R. S. 1894 (section 3038 R. S. 1881). This section provides that when thirty resident freeholders of the ward to be affected, shall petition the common council for the creation of a new ward, or wards, to be formed from *added territory*, or by the consolidation of existing wards, etc., the council shall submit the question to the voters of the city at the next annual election. This section was the only express law for the creation of new wards, until an act of the Legislature, approved March 4, 1891, was passed. Acts 1891, p. 83; section 3470, R. S. 1894. Section 1 of this act provides that the common council of all cities in this State, organized under the general law, "shall have the power, and are hereby invested with the authority, to divide the said city into wards, to change the boundaries of existing wards, and to redistrict the cities for ward purposes, whenever, in their judgment, it shall be deemed expedient so to do."

It is further provided by this section that no division into wards or change of boundaries, or redistricting for ward purposes, shall be made oftener than once in every period of ten years. Section 2 pro-

at same meeting
announced
and adopted
at same meeting

at same meeting
appointed
councilmen

proceedings
referred to
H.

vides that the council, upon doing any of the acts enumerated in section 1, shall do so by ordinance, etc. By section 3 all laws and parts of laws in conflict with any of the provisions of the act are expressly repealed. By an act of the Legislature, approved March 8, 1895 (Acts 1895, p. 173), the act of 1891 was materially amended, and the limitation upon the subsequent action of the council was fixed at two years. It is manifest that the act of 1891 fully invested the common council of such cities as the one in question with the power and authority to do by ordinance these acts, when it was deemed by it expedient so to do. First, to divide the city into wards; second, to change the boundaries of existing wards; third, to redistrict the city for ward purposes. Empowered in this manner to divide the city into wards, it is evident that the council, in the exercise of such power, by dividing the city into wards *de novo* could, as a natural sequence, create an additional ward or wards, and in this manner occasion a vacancy in the office of councilman, which the council would be authorized to fill by appointment, under the act approved February 26, 1891 (Acts 1891, p. 33). We cannot presume that common councils of cities, whose members are the servants of the people, will abuse the power thus granted to them, and unnecessarily create additional wards in their respective municipalities, and thereby impose upon the tax-payers the extra burden of paying the expenses of useless or unnecessary officers. The act of 1891 (section 3470, R.S. 1894) is broad and plain in its terms or meaning, and is not open to judicial interpretation, unless we eliminate words from the written law, and this we are not authorized to do. This statute covers the subject-matter of section 3469, *supra*, and its provisions are repugnant thereto, hence it follows that the former has necessarily repealed the latter. We are, therefore, compelled to adjudge that the common council of the city of Plymouth had full warrant and authority under the act of 1891 to adopt the ordinance and thereby divide the city into four wards.

The second proposition with which we are confronted is vital in its bearing upon the action of the council in passing the ordinance in controversy.

The validity of the ordinance is essential or fundamental to the claims made by the relators. If for any reason it is invalid, the rights of the latter are unfounded, and the appellant would be justified in his refusal to recognize them as members of the council, and hence they must necessarily fail in the prosecution of this action. On May 26, 1873, the common council of the appellant's city duly passed and adopted an ordinance embracing a series of rules and regulations for the government of the common council in transacting its business, and as to the mode of proceeding in the enactment of ordinances. Some of these are merely rules of parliamentary law. Section 21 of this ordinance is as follows:

"All ordinances shall be read three times before being passed, and no ordinance shall pass or be read the third time in the same meeting

(that) it was introduced: *Provided, That the council may suspend the rule by a two-thirds vote, and put an ordinance upon its passage by one reading at the time it is read.*

There is no question but ~~what this rule was~~ in full force and effect at the time of the introduction of the ordinance under consideration, and there is evidence showing that it had generally been recognized and followed by the council in the adoption of ordinances. It is the rule set up and relied upon by appellant in the second paragraph of his answer, in which it was, in substance, alleged that the ordinance upon which the relators based their claim and right to be recognized and to act as councilmen, had been passed in violation thereof. During the trial the court permitted the appellant to introduce this rule or ordinance in evidence, but subsequently, before the cause was finally submitted to the jury, upon the motion of appellees the court struck out and withdrew this evidence, over appellant's objections and exceptions, and this action of the court was assigned as one of the reasons in the motion for a new trial. The trial court seemingly justified its action in eliminating this evidence upon the ground, as insisted by the relators, that this rule had been repealed as the result of the motion made by councilman Tibbetts and carried in the manner as we have heretofore stated, and that the same was not in force when the ordinance in question was passed

The verbal motion made by this councilman as recorded by the clerk by which it was sought to effectually repeal the rules ordained for the government of the council was, to say the least, somewhat indefinite. When recorded it read: "*That the rules heretofore governing the proceedings of council as printed in the ordinance book be, and the same are hereby, annulled and repealed.*"

The italics are our own. Ordinances of cities are held to be in the nature and character of local laws adopted by a body vested with legislative authority, and coupled with the power to enforce obedience to its enactments. The power with which common councils of cities are invested to enact ordinances and by-laws implies the power to amend, change, or repeal them, provided that vested rights are not thereby impaired. But certainly it cannot be successfully asserted that the law will yield its sanction to the mode employed to repeal the one by which the rule in controversy was ordained and established. If the procedure by which the power of repeal was attempted to be exercised upon the occasion in question, could be sustained, then all that would be necessary to accomplish the repeal of all existing ordinances of a city would be the adoption, at any regular meeting by the common council, of a mere verbal and general motion to that effect, without any reference whatever to the title, number or date of passage of the ordinance or ordinances, intended to be repealed. In the case of *Bills v. City of Goshen*, 117 Ind. 221 (3 L. R. A. 261), it was held by this court that a defect to an ordinance could not be cured or amended by means of a motion subsequently made by a member of the council and put to a

vote and carried. In *Horr and Bemis Municipal Ordinances*, section 61, it is said: "Express repeals can only be effected by an act of equal grade with that by which the ordinance was originally put in operation. No part or feature of an existing ordinance can be changed by a mere resolution of the council, even though signed by the mayor and recorded. A new ordinance must be passed." See also sections 63 and 64, same authority. In *Jones v. McAlpine*, 64 Ala. 511, an attempt was made by a motion to raise or change the license fee in a certain ordinance by the mayor and board of aldermen of the city of Talladega; this method was held to be ineffectual in its results. The court said: "Until an ordinance had been adopted by the mayor and aldermen, changing the ordinance of May 9, 1877, the ordinance remained in full force, though there was an intention to change, and a declaration of the will of the board that it should be changed."

Considered then in the light of the authorities which we have cited, and the manifest reason which necessarily underlies and sustains the rule which they assert, the conclusion is irresistibly reached that the attempt to repeal the ordinance which embraced the series of rules and regulations in question, by the action of the council in adopting the motion in controversy, was ineffectual, and did not result in the repeal or abrogation of the rule under consideration. Having reached this conclusion, the inquiry arises as to the effect of the operation of this rule upon the ordinance upon which the relators found their claims, and which was passed and adopted as it appears by the council in violation of its provisions. It is said in *Dillon on Municipal Corporations*, section 288: "After a meeting of the council is duly convened, the mode of proceeding is regulated by the charter or constituent act, by ordinances passed for that purpose, and by the general rules, so far as in their nature applicable, which govern other deliberate and legislative bodies." In section 47 of *Bemis and Horr, supra*, it is said: "The usual statutory direction is that every ordinance shall be read at three different meetings before its final enactment. The direction is necessary as a safeguard against too hasty legislation, and its observance mandatory. If neglected, the ordinance is *ab initio* void." In *Beach on Public Corporations*, section 494, it is said: "The mode of enacting the ordinance is generally prescribed in the charter or an ordinance, and their requirements should be strictly complied with. So where the charter prescribes that no by-law shall be passed unless introduced at a previous meeting, the provision has been held to be mandatory, and a by-law passed in violation thereof to be void." In the case of *Horner v. Rowley*, 51 Iowa, 620, the question arose as to the validity of a town ordinance authorizing the issuance of a license for the sale of wine and beer. It appeared that the council that adopted the ordinance involved in that case consisted of seven members. The statute of the State provided "that ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the council shall dispense with the rules." Upon a

motion to dispense with the reading required under the rule, four members voted in the affirmative, and none in the negative; the mayor decided the motion carried, and the ordinance was adopted. The court said: "As four, the number who voted to suspend the rule, and pass the ordinance, is not three-fourths of seven, it follows that the ordinance was not legally enacted. It was, therefore, void; and no valid act could be done under its provisions." The statutes of Ohio relating to cities require that ordinances of a permanent nature shall be read on three different days, unless three-fourths of the members of the council dispense with the rule. In the appeal of *Campbell v. Cincinnati*, 49 Ohio St. 463, it was held that this provision was mandatory, and that in passing several ordinances "in a lump" it was requisite to suspend the rule as to each in order to render its final adoption legal and valid. In considering the question therein involved, the court, per *Dickman, J.*, said: "But municipal corporations act not by inherent right of legislation, like the Legislature of a State. . . . They are creatures of the statute, invested with such power and capacity only as is conferred by the statute, or passes by necessary implication from the statutory grant, and their powers must be strictly pursued. *Cooley Const. Lim.*, 6th ed., 227. *Willard v. Killingworth*, 8 Conn. 247; *Ex parte Frank*, 52 Cal. 606. The rule, therefore, as stated in numerous adjudged cases is, that the mode of procedure to be followed in the enactment of ordinances as prescribed by statute must be strictly observed. Such statutory powers constitute conditions precedent; and, unless the ordinance is adopted in compliance with the conditions and directions thus prescribed, it will have no force. 17 Eng. and Am. Ency. of Law, p. 288, and cases cited. In *Clark v. Crane*, 5 Mich. 151, the supreme court laid down the rule that 'what the law requires to be done for the protection of the tax-payer is mandatory, and cannot be regarded as merely directory.' The requirement that ordinances . . . shall be fully and distinctly read upon three different days, being designed as a safeguard against rash and inconsiderate legislation, and being in a great degree essential to the protection of the rights of property, it should be deemed a mandatory measure intended as a security for the citizen." The case of *State, etc., v. Priester*, 43 Minn. 373, asserts the same rule and the reason therefor.

This court in the appeal of the *City of Logansport v. Crockett*, 64 Ind. 319, held that section 3534, R. S. 1894 (section 3099, R. S. 1881), which requires that on the adoption or passage of any by-laws, ordinances or resolutions, the yeas and nays shall be taken and entered on the record, was mandatory, and that a noncompliance with this provision rendered the adoption of the ordinance nugatory. See *Dillon, Mun. Corp.*, section 291. It is not necessary that we should further extend the consideration of the question or refer to additional authorities to show that when the legally prescribed method of procedure in the enactment of an ordinance is neglected or violated, the latter is thereby rendered invalid and of no force or effect. This doc-

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trine, or principle, seems to be firmly settled by many leading authorities and decisions. The inquiry then is: Is the same principle applicable when the procedure is one prescribed by an ordinance of the common council enacted under the exercise of the power granted by the Legislature? There is no statute in this State that embraces or contains the provisions or requirements, in regard to the passage of an ordinance by the common council, that are contained in section 21 of the ordinance in question. This right to regulate such proceedings in this particular respect seems to have been committed by the Legislature to the common council.

Section 3533, R. S. 1894 (section 3098, R. S. 1881), among other things provides that "The common council may, by ordinance, prescribe such rules and regulations, in addition to those herein contained, for the qualification and official conduct of all city officers, as they may deem for the public good, and which shall not be inconsistent with the provisions of this act." By section 3616, R. S. 1894 (section 3155, R. S. 1881), it is further provided in addition to the powers expressly granted, that the common council shall have power to make other by-laws and ordinances not inconsistent with the laws of the State and necessary to carry out the objects of the corporation, etc.

By these provisions plenary powers are given to the council to pass or adopt ordinances prescribing rules and regulations not inconsistent with law, for its government and control, when duly convened and acting officially, in regard to its proceedings upon the passage of an ordinance or otherwise. We have seen by some of the leading authorities which we have herein cited, that when the mode of proceeding upon the part of the council in the adoption of an ordinance is regulated either by the charter or an ordinance enacted thereunder, this prescribed mode must be strictly followed. Ordinances of a city duly enacted are in the nature of laws, being the decree or will of the common council, which body is vested with legislative authority. Public policy demands and authority sanctions the delegation of various powers of local legislation to this municipal body. The ordinances enacted in the exercise of these powers have, within the corporate limits of the city, the force of laws. They are held by the courts to be, within these limits, as binding as the laws of the State and general government, and are enforced in a similar manner and under like rules of construction. When an ordinance is duly and legally passed, under the warrant of the Legislature, it is in force by the authority of the State. Bemis and Horr Munic. Ordinances, section 2; Beach Pub. Corp., sections 482, 486. A by-law or ordinance which a municipal corporation is authorized to adopt is as binding on its members and officers, and all other persons within its limits, as a statute of the Legislature. *Heland v. City of Lowell*, 85 Mass. 407 (3d Allen); *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, and authorities cited; *Tiedeman Munic. Corp.*, section 153; *Dillon Munic. Corp.*, sections 307, 308.

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In *Milne v. Davidson*, 8 Martin, 586 (La., 5 N. S.), a contract entered into in contravention of an ordinance of the city of New Orleans was held to be void. The court said: "The ordinances of a corporation while acting within the powers conferred upon them by the Legislature, have as binding an effect on the particular members of that corporation as the Acts of the General Assembly have on the citizens throughout the State; and it is as much a breach of duty to evade or violate the one as it would be to evade or violate the other. The moral or legal obligation to obey them is the same, and the consequence of nonobedience ought to be the same."

These many authorities which substantially enunciate and sustain the proposition that a municipal ordinance is a local law or statute (upon which rests both the moral and legal obligation to obey of all persons subject thereto), and that the results of a non-compliance with the mandatory or prohibitory provisions thereof, must in reason be the same in effect, as follow the disobedience or disregard of an act of the Legislature of like import, warrant the conclusion and holding that when the charter law of a city does not regulate the mode of procedure to be observed upon the adoption of an ordinance by the council, but has committed the authority or power so to do to that body which, in pursuance thereof, has prescribed by ordinance an essential and salutary rule, mandatory and prohibitory in its provisions as is the one under consideration, the council must yield to it their obedience, and in the enactment of an ordinance must be controlled thereby, unless suspended in the manner or by the vote provided, and that the consequence of refusing to substantially comply with its provisions or a violation of its inhibition must, in reason, be the same as the non-compliance with or a violation of a requirement prescribed by the statute.

The section of the ordinance in question prescribed substantially that "All ordinances *shall* be read three times before being passed. No ordinance shall pass or be read at the same meeting in which it was introduced." The word "all" may mean every, and is to be construed in this connection. *Bloom v. Xenia*, 32 Ohio St. 461. We may, therefore, read the rule thus: "Every ordinance shall be read, etc." The first clause is mandatory and the second prohibitory. Such a rule prescribed for the government of legislative bodies is recognized by the courts as a salutary one. It is a check upon what sometimes might prove to be ill advised, prematurely considered, or pernicious legislation. If a common council were permitted to wilfully ignore, utterly disobey, and violate an ordained rule of this character, injurious results to the inhabitants of the corporation might and possibly would result.

It is, therefore, the duty of courts to require a strict compliance with mandatory provisions of the law of the character and purpose of the one in question. A two-thirds vote of the council was required to suspend the rule; this, in reason at least, must be construed and

held to mean not less than two-thirds of all the members present at any meeting of the council. *Atkins v. Phillips*, 10 L. R. A. 158, 26 Fla. 281. It appears from the record, that the acts of the council antecedent to, and including the final passage of the ordinance creating the ward in controversy, received the votes of, and were sanctioned by, three only of the six councilmen present at the meeting. Three cannot be held to be two-thirds of six, hence, in no manner, or upon any view of the case, was a suspension of the rule effected. Viewed then in the light of the reason and logic of the authorities herein cited, we are constrained to hold and adjudge that the ordinance having been passed in noncompliance with, and in violation of, the ordained rule in controversy, it is invalid and inoperative, and that the action of the council based thereon in appointing the relators, is likewise void, and, consequently, the latter cannot successfully maintain this action. *City of Logansport v. Legg*, 20 Ind. 315. Appellant was entitled to expose by sufficient facts in his answer the invalidity of the relators' appointment, and to prove the same by evidence upon the trial. While, perhaps, the second paragraph of the answer, or return, contained some irrelevant or impertinent facts that might have been eliminated upon motion, still the facts alleged as to the ordinance having been adopted in disregard and violation of the rule in question were pertinent and material in defense of the action, and the paragraph ought not to have been suppressed. *Atkinson v. Wabash R. R. Co.*, at last term (41 N. E. R. 947).

We must not be understood as holding by this opinion that the nonobservance of mere technical rules of parliamentary law which are employed for convenience in governing the action of common councils, would result in rendering an act of such bodies otherwise valid invalid, but our holding is confined to the particular rule under the circumstances and facts in question.

From the conclusion we have reached, it follows that the trial court erred in striking out the second paragraph of the answer, and also in holding that the rule had been repealed by the motion as made, and the judgment cannot be sustained. It is therefore reversed and the cause is remanded, with instructions to the lower court to vacate its order awarding the peremptory writ of mandate, and to overrule the motion to strike out the second paragraph of appellant's answer, and grant him leave, if requested, to file an amended one, and for further proceedings in accordance with this opinion.

STECKERT v. EAST SAGINAW.

1870. 22 Mich. 104.

COOLEY, J. This is a bill to restrain the collection of an assessment for paving Washington street, in the city of East Saginaw, with what

is known as the Nicholson pavement. The complainants are owners of lots in said city upon which the assessment is a lien, and they ask for a perpetual injunction against its collection upon the ground that the proceedings to levy it have not been in accordance with the charter of the city, which prescribes the several steps to be taken in such cases.

The first ground of alleged invalidity in the proceedings is that the several votes in the common council ordering the improvement made, directing a contract therefor and the levy of an assessment for payment of the expense thereof, were not taken by ayes and noes as the charter requires.

The provision of the charter on this subject is that "Whenever required by two members, the votes of all the members of the common council, in relation to any act, proceeding or proposition, had at any meeting, shall be entered at large on the minutes; and such vote shall also be entered in relation to the adoption of any resolution or ordinance, report of a committee or other act, for taxing or assessing the citizens of said city, or involving the appropriation of public moneys." S. L. 1859, p. 971.

The proceedings in question were such that the votes thereon were required, under this section, to be entered at large on the minutes whether specially required by two members or not. The defendants insist that this section has been complied with, in substance and in spirit, in every instance; while the complainants on the other hand argue that a disregard of its provisions is manifest throughout. Upon this point the evidence of the minutes must be conclusive, and if we find the votes entered there at large, the objection must fail.

On looking at the minutes we find that the votes have uniformly been entered and recorded in the same way; and we may therefore take the proceedings on any one of the several votes as a sample of them all. The vote ordering the contract for paving the street to be entered into was had June 29, 1868. The record of the meeting of the council on that evening begins as follows:

Regular meeting, Monday evening, June 29, 1868. The council met pursuant to adjournment. Present, Aldermen Buckhout, Carlisle, Eastman, Morley, Owen, Wood and Zimmerman. — 7. By Alderman Carlisle, "Whereas," etc., [here follow the resolutions, after which is this minute]. Adopted unanimously on call.

Unless the minute is a compliance with the section of the charter in question, it is not claimed by the defendants that it has been complied with at all; but their argument is that the record shows, first, the names of the several aldermen who were present when this action was had; second, that the roll was called on the vote; and third, that each of them, when the roll was called, voted for the adoption of the resolutions. This being so, the vote is, in effect, entered at large on the minutes, and the repetition of the names of the alderman in the minutes, when the precise position of each upon the resolutions submitted was

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already recorded, would have been only an idle ceremony, accomplishing no useful purpose.

We have found ourselves unable to take the same view of this record that is taken by the counsel for defendants. There can be no doubt that the provision of the statute which requires these votes to be entered at large on the minutes, was designed to accomplish an important public purpose, and that it cannot be regarded as immaterial, nor its observance be dispensed with. *Spangler v. Jacoby*, 14 Ill. 297; *Supervisors of Schuyler Co. v. The People*, 25 Ill. 183. The purpose, among other things, is to make the members of the common council feel the responsibility of their action when these important measures are upon their passage, and to compel each member to bear his share in the responsibility, by a record of his action which should not afterwards be open to dispute. Now if the record in the present case shows precisely who voted for the resolution in question, it is apparent that the object of the statute has been fulfilled, and we may be able to sustain the action, notwithstanding the compliance with its provisions has not been exactly literal.

We are of opinion that the record does not show with sufficient certainty that all the members present at roll-call, at the opening of the meeting in question, voted for the resolutions; and if it does not show that all did, it does not show that any particular one of them did. What it does show is, that at roll-call when the meeting was opened certain members named were present, and that afterwards, before the meeting adjourned, certain resolutions were adopted unanimously on call. Now if it were a legal presumption that all the members who were present at the call to order of such a meeting remained until its adjournment, and that no others came in and took their seats afterwards, and if it were also a presumption that every member voted on each resolution on roll-call, the argument of defendants would be complete, and we could say with legal certainty from this record that these resolutions were passed with the affirmative vote of each of the members named as present in the clerk's minutes of the meeting in question.

But surely there are no such presumptions of law, and if there were, they would be contradictory to the common experience of similar official bodies. It is very well known that it is neither observed nor expected that when a legislative body of any grade has commenced its daily session, the doors will be closed to prevent the ingress of members not prompt in arrival, or the egress of others who may have occasion to leave. The actual attendance on such a body will frequently be found to change materially from hour to hour, so that a record that a vote was passed unanimously would be very slight evidence that any particular member present at the roll-call voted for it, or that any member not then present did not. And even if the record could be held to afford a presumption on that subject, its character must be so faint, doubtful, and unreliable as to subserve no valuable purpose.

Moreover, the members actually present are usually allowed to vote or not to vote at their option, except in cases of close votes, or where an appeal is to be made to the people; and if the vote of a quorum is in favor of a resolution and no vote is cast against it, the record may still be that it was "adopted unanimously on call," though some of the members present abstained from voting.

What is designed by this statute is, to fix upon each member who takes part in the proceedings on these resolutions, the precise share of responsibility which he ought to bear, and that by such an unequivocal record that he shall never be able to deny either his participation or the character of his vote. But manifestly we cannot determine in the present case with any certainty that any one of the aldermen named — Alderman Buckhout, for example — actually voted for the resolutions in question. We know he was present when the council convened, but we have no record which points specifically to his individual action afterwards. Suppose he were to contest the tax as illegal, and the city authorities were to insist upon an equitable estoppel arising upon his vote in its favor, and he should deny such vote, we should look in vain in this record for anything absolutely inconsistent with such denial. Suppose his constituents, dissatisfied with this vote, undertake to call him to account for his participation, and he were to say to them, "I was not present when these resolutions were adopted; I was indeed present when the council convened, but was called away soon after on private business;" this record plainly could not be relied upon to contradict his assertion. The persons arraigning him would be obliged, in order to fix his responsibility, to resort to the parol evidence of his associates or of bystanders. But the legislature understood very well the unsatisfactory character of that kind of evidence, and they did not intend that the power to call an alderman to account for misconduct, delinquencies, or errors of judgment in the performance of this official duty, should be left to depend upon it. They have imperatively required that there should be record evidence of a character that should not be open to contradiction, or subject to dispute; and their requirement cannot be complied with according to its terms, nor satisfied in its spirit and purpose, without entries in the minutes showing who voted on each resolution embraced by the section quoted from the charter, and how the vote of each was cast. In other words, the ayes and noes on each resolution must be entered at large on the minutes, so that the presence or participation of any member shall not be left to conjecture or inference.

It was frankly conceded on the argument by the counsel for the city, that if we reached this conclusion, the assessments in question must be declared void, unless the complainants could be held estopped from raising the objection on certain equitable grounds which were insisted upon. One of these grounds applies only to three of the complainants, and it consists in the fact that they were petitioners to the common council to have this very improvement made.

In *Motz v. Detroit*, 18 Mich. 495, we held that where parties petitioned the city authorities to have a certain improvement made which was provided for by the city charter and ordinances, they must be understood as requesting that it be done under such charter and ordinances, and if those turned out to be invalid, the petitioners were not entitled to set up such invalidity as a basis for equitable relief against the action which they had requested. The case before us, however, is of a different character. The complainants do not claim that the charter under which the assessment was made is void, but they complain that its provisions have not been followed. Three of the complainants admit asking that the improvement be made in accordance with the law, but they aver that the attempt has been made to construct it in disregard of the law, and that their interests are injuriously affected by the failure of the council to follow the statutory provisions. If they are correct in their facts, we do not see how they can be estopped from claiming relief.

The second ground of estoppel applies to all the complainants, and it consists in the fact that they were all residents of the city of East Saginaw, and presumptively cognizant of the proceedings being taken, and of the irregularities which existed, and yet made no complaint until the work was completed, though they knew that under the charter the contractor who did the work could only be paid from this assessment. This ground of estoppel appears to us to be rather far-reaching and somewhat dangerous. To hold that a man is bound at his peril to take notice of illegal action on the part of the public authorities, is carrying the doctrine of constructive notice very much farther than the authorities will warrant. We think, on the other hand, that the citizen has a right to assume that the law is being obeyed, instead of violated, by the public authorities, and that, at least in the absence of any evidence of previous knowledge on his part of their unlawful action, he is in time with his protest when they proceed to deprive him of his rights under such proceedings. We do not find, therefore, that any principle of estoppel will preclude the complainants from the relief prayed.

As the views already expressed dispose of the case, we might, perhaps, with propriety abstain from going farther, but there are some other questions presented by the record which are liable to arise again, and therefore ought, in justice to the parties, to be disposed of now.

One ground of invalidity assigned by the complainants is, that two of the aldermen who formed a part of the quorum of the common council when important action was taken, and without whose presence and votes there would have been no quorum, were petitioners for the improvement, and owners of property liable to assessment therefor. The votes of these aldermen, it is claimed, were void, and consequently the action of the council, to which their votes were essential, was void also.

We think this objection without force. The action in question was legislative in character, and the interest these aldermen had in it was

of precisely the same nature with that which every legislator has in a bill he votes for, which is to subject his property, in common with that of his fellow citizens, to taxation. They were laying down rules, which in their operation would affect alike and impartially their own interest and that of all others whose property would be taxed. Such an interest is calculated to make a man careful and solicitous for the public interest, with which his own is inseparably connected, instead of inclining him to vote recklessly or corruptly when burdens are to follow which he must share. None of the cases cited on the argument in this connection have any bearing. Those only decide that a man is not to be permitted to occupy inconsistent positions when his own interest is directly involved; but in no question here voted upon could these aldermen have discriminated between their personal interest and that of the other tax-payers, except in fixing the taxing district; and as on that question if they voted at all it was against their apparent interest, and in favor of making the district which included their property the smallest possible, it is obvious that they did not by their vote place themselves in a position antagonistic to other tax-payers. If the common council acted as commissioners of apportionment in making the assessment upon the property that was to bear the burden, other considerations might be involved; but this charter designates a different tribunal for that purpose and prescribes great caution to insure impartiality. On the confirmation of the commissioners' report questions might have arisen in which the interest of these aldermen would have been direct and special; but no such appear by this record.

It is also objected that the resolution of the common council declaring the improvement contemplated to be necessary, is required by the charter (Laws of 1859, p. 997) to describe the improvement, while in the one adopted no sufficient description appears.

The contemplated improvement is only described as the paving of the street with the Nicholson pavement between specified termini. But we think this a sufficient compliance with the charter. The Nicholson pavement is a process well known and understood; and nothing but a very general description can be required or be important in this resolution. We also think that the removal of earth for the paving and the setting of curb-stones, concerning which some question is made by the bill, may properly be treated as incidental to this paving, and not as separate improvements requiring to be described and ordered specifically as such.

Two other objections are not so easy of disposition. One is that the resolution of the council, appointing commissioners to make an assessment of the expense of the improvement upon the property benefited, laid down a rule for their action which made it imperative on the commissioners to assess upon each lot the expense of paving in front of it, and allow them no discretion to adopt any different basis of assessment if they regarded any other more equitable.

The resolution in question is of very uncertain construction, and we

are not entirely satisfied that complainants are correct in the view they take of it. But it does not become necessary to decide this point, as in any event the decision cannot depend upon it. It is enough to say that, under the charter, the council have no power to give directions which shall govern the commissioners in making their assessment.

The commissioners are "to make an assessment upon all the owners or occupants of lands and houses within the portion or part of the city so designated [by which is meant, within the taxing district previously designated by the common council], of the amount of expense in proportion as nearly as may be to the advantage which each shall be deemed to acquire by making of such improvements" (Laws of 1859, p. 1011); and it is their judgment and not that of the common council which is to determine whether the adjoining lots are benefited in proportion to their respective street fronts, or whether, on the other hand, the assessment ought not to be apportioned on some other basis than that of frontage.

The second objection just referred to is, that the commissioners, in their report of the assessment to the common council, did not report the valuation of the respective lots assessed. This is expressly required by the charter (Laws 1861, p. 50), but the defendants insist that the provision on this subject is merely directory, since it can subserve no valuable purpose when the assessments are not made on a basis of valuation, and therefore the tax-payers have no interest in its being complied with.

We think, however, that the tax-payers may have an interest in its being complied with. The commissioners are not precluded from making their assessment with some reference to valuation; and as the common council review their action, and hear and decide complaints of inequality and injustice, the respective valuations of lots constitute important information to be possessed by them when proceeding to perform this duty. It is easy to see, where an assessment is made with reference mainly to frontage, that it might sometimes be exceedingly equitable to take valuation somewhat into account also, at least in exceptional cases; and we cannot say, therefore, that the requirement that the valuation shall be returned is not mandatory. We think all legislative provisions, in such cases, should be regarded as mandatory, where they seem to be adopted for the protection of the taxpayer, and may have an important influence in shielding him from unequal and unjust burdens.

For the reasons given we are constrained to affirm, with costs, the decree of the court below.

CAMPBELL, CH. J. and GRAVES, J. concurred.

CHRISTIANCY, J. did not sit in this case. •

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VANCOUVER v. WINTLER. 47

1894. 8 Wash. 378.

STILES, J. The respondent, a city of the third class, seeks in this action to foreclose certain liens for street assessments against parcels of land abutting on the street and owned in severalty by the appellants. There were originally three separate actions, but under stipulation they came up as one case.

1. The first point made by appellants is, that the general ordinance governing street assessments was void because not passed in the manner required by the statute.¹ The law governing the passage of ordinances is contained in Gen. Stat., §635, the first clause of which is:

"No ordinance, and no resolution granting any franchise for any purpose, shall be passed by the city council on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting, nor without being first submitted to the city attorney."

The respondent has deemed it important to claim, and argue at length, that the provision applies only to ordinances and resolutions granting franchises; but we think the position is untenable. It is the only provision in the act, of which it was a part, governing the matter of the passage of laws by the council, and the last clause of the section, which relates to the number of votes required to pass any ordinance, resolution or order, clearly shows an intention to make a general application of the whole section to all ordinances of every kind and for every purpose.

But the complaint of the appellants is that, although more than five days elapsed between the introduction of ordinance 242 and its passage, the original ordinance was not passed, but a substitute reported by the city attorney. It is a well-known practice of legislative bodies to proceed in this manner, and so long as the substitute is clearly within the limits of the subject matter of the original proposition we see no reason why municipal councils should not proceed in the same way. It is a mere method of amendment, and if the changes made are such as might have been brought about by ordinary amendments the statute is not infringed. This was the case with the ordinance in question, and it was therefore properly passed.

PORTLAND v. YICK. 45

1904. 44 Or. 439.

WOLVERTON, J. The defendant was convicted in the Municipal Court of the City of Portland of the violation of ordinance No. 11,336;

¹ Only so much of the opinion as discusses this point is given.—ED.

and appealed to the circuit court, wherein he was again convicted, and now appeals to this court. He is charged with the violation of section 2 of the ordinance, which provides:

"No person or persons shall within the corporate limits of the City of Portland set up or keep, either as owner, proprietor, keeper, manager, or employe, with or without hire, lessee or otherwise, any house, shop or place for the purpose of selling any lottery ticket, certificate, paper or instrument, purporting or representing, or understood to be or to represent, any ticket, chance, share or interest in or depending upon the event of any lottery."

Section 6 provides for the punishment of any violation of the ordinance by fine or imprisonment, or both. When the city offered evidence at the trial in the circuit court it was met with the objection by the defendant that the ordinance had not been adopted in the manner provided by charter and the rules governing the common council, and was therefore void and inoperative. None of the records of the common council relative to the adoption of the ordinance were introduced in evidence, but the court was asked to take judicial knowledge thereof, and thereby determine the validity of its adoption. Under section 27 of the city charter of 1898 (Laws 1898, pp. 101, 108), the common council was authorized to adopt rules for the government of its members and its proceedings. It was required, however, to keep a journal of its proceedings, and upon the call of any two of its members to cause the yeas and nays to be taken and entered in the journal upon any question before it. In pursuance of this charter regulation, the following among other rules were adopted, viz:

"Rule 26. No standing rule as provided by this ordinance shall be rescinded or suspended, except by vote of two-thirds of all the members present, and the yeas and nays shall be recorded on any motion to suspend a rule.

"Rule 27. Every ordinance shall receive three readings previous to its being passed, but shall not be read more than twice at any one meeting. . . ."

The journal shows that the ordinance was read the first time and second time by title, and, on motion of Councilman Harris, duly seconded and carried, Rule 27 was suspended, the ordinance read a third time by title, placed upon its final passage, and passed by 11 yeas, giving the names of the councilmen voting yes. The ordinance has this attestation at the bottom:

"Passed the Council, March 21, 1900.

A. N. Gambell, Auditor.

"Approved, March 22, 1900.

W. A. Storey, Mayor."

On the back there are attached two slips, each containing the names of the councilmen, with the words, "Yeas," "Nays," at the top in separate columns. One of them bears at the top the notation in pencil, "Suspension Rule 27," and opposite each name in the column

headed "Yeas" a perpendicular pencil mark. The other bears at the top the word "Passage," with a like mark opposite each name in the column headed "Yeas," thus indicating that Rule 27 was suspended by a unanimous vote, and the ordinance passed by a like vote, the latter showing the vote to be the same as recorded in the journal.

1. Preliminarily, it is urged that the courts will not take judicial knowledge of the acts of the common council leading to the adoption of an ordinance, but only of the text or provisions of the ordinance. It will be noted that the charter regulations relating to the keeping of a journal by the common council are almost identical with the requirements of the state constitution for the government of each house of the legislative assembly. This court said in *State v. Rogers*, 22 Or. 348, 364 (30 Pac. 74), Mr. Justice BEAN announcing the opinion: "In *Currie v. Southern Pac. Co.*, 21 Or. 566 (28 Pac. 884), we held that the court will take judicial knowledge of the journals of the legislature for the purpose of impeaching the validity of the enrolled act on file with the Secretary of State; and when from such journals it affirmatively appears that the bill as filed in the Secretary of State's office did not in fact pass the legislature, the courts will refuse to recognize it as a valid law; but every reasonable presumption is to be made in favor of the legislative proceedings; and when the constitution does not require certain proceedings to be entered in the journal, the absence of such a record will not invalidate a law. It will not be presumed, from the mere silence of the journal, that either house has exceeded its authority or disregarded constitutional requirements in the passage of legislative acts." The bill which was the subject of controversy in that case passed the house and was amended in the senate. When returned to the house that body concurred in the amendments. This was shown by the journal, but it did not show that the bill as amended was read section by section on the final passage, nor that the vote was taken by yeas and nays, as required by article IV, § 19, of the constitution. Conceding that the yeas and nays should have been thus taken in that instance, the court further say: "We must assume, in the absence of a showing to the contrary, that the constitutional requirements were observed, and hold that the act under consideration was constitutionally passed." In the *Currie* case, alluded to in the opinion of the court in *State v. Rogers*, 22 Or. 348 (30 Pac. 74), the bill went to the senate after passing the house, and the journal shows that it was put upon its final passage, when it received 13 yeas and 11 nays. There were five absent and one senator was excused; "so," continues the record, "the bill failed to pass." There was an affirmative showing that the bill failed to pass, and the court took judicial cognizance of the record in the journal, and declared the act inoperative.

The same principle was announced in *McKinnon v. Cotner*, 30 Or. 588, 591 (49 Pac. 956). The bill in that instance passed the house, went to the senate, and was amended by the addition of section 8,

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being an emergency clause, and passed, when it was returned to the house and the amendment concurred in. This is all shown by the journals of the two houses, but no other reference is made therein to the bill, except to show that it was duly signed by the presiding officers. The enrolled act so signed was approved by the Governor, filed in the office of the Secretary of State, and published among the general laws, but it did not contain section 8, and the act was held valid because it nowhere appeared in the journals that the act did not pass in the form actually signed by the presiding officers and as found on file in the office of the Secretary of State. In all these cases, if we are rightly informed, the court took judicial knowledge of the state of the record as shown by the journals in the two houses, without the necessity of their introduction in evidence. Indeed, the general rule seems to be that courts will take judicial notice of the contents of the journals and other records of legislative bodies, required to be kept by the fundamental law, which may in any manner affect the validity or the meaning and proper construction of an act. But further than this they will not go, and they will not take judicial cognizance of any fact that is without legal potency to affect the validity of the act or to explain its meaning or construction: 17 Am. & Eng. Enc. Law (2 ed.), 928, 929; *Division of Howard County*, 15 Kan. 194; *People v. Mahaney*, 13 Mich. 481; *Green v. Weller*, 32 Miss. 630; *Somers v. State*, 3 S. D. 321 (58 N. W. 804); *Ritchie v. Richards*, 14 Utah, 345 (47 Pac. 670); *McDonald v. State*, 80 Wis. 407 (50 N. W. 185). Under the doctrine of this court it will not look behind the enrolled bill having the signatures of the presiding officers of the two houses and filed in the office of the Secretary of State, except to determine whether it appears affirmatively from the records of those bodies that the mandatory provisions of the constitution have not been observed in the enactment; and, unless it does so appear, the law will not be declared invalid. Mere silence of the journals as to such a requirement will not suffice to overthrow it, unless it might be in a case where the constitution requires an entry in the journal, as the presumption will then obtain that the legislature proceeded regularly and properly. Such being the ascertained rule and doctrine, the further solution of the present problem is not difficult.

2. The municipal courts will take judicial notice of the ordinances of the municipality and of such journals and records of the law-making body as affect their validity, meaning, and construction in like manner and for like purposes as the courts of the State take judicial cognizance of the public statutes of the State, and, in the event of an appeal to the circuit court, although by the rules of law the case is to be tried *de novo*, the circuit court will take like judicial notice of such ordinances as the municipal courts. We are not saying that it will not do so upon any other principle, but it will upon this, which suffices for the determination of the present controversy: *City of Solomon v. Hughes*, 24 Kan. 211; *Downing v. City of Miltonvale*, 36 Kan. 740

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(14 Pac. 281); *State, for use v. Leiber*, 11 Iowa, 407; *Town of La-porte City v. Goodfellow*, 47 Iowa, 572; *Town of Moundville v. Velton*, 35 W. Va. 217 (18 S. E. 373).

3. The charter as to the common council stands in the same relation that the constitution does to the two houses of the legislative assembly, and, if the ordinance in question is to be impeached or overthrown, it must appear affirmatively from the journal of the common council that the mandatory provisions of the fundamental law relative to the passage of the ordinance have not been observed. The courts will not look into minor records that the council may require to be kept to determine whether the rules which it has adopted for the orderly dispatch of the business before it have been complied with, and whenever it is not affirmatively shown by the journal (mere silence of the record not amounting to such a showing) that the charter provisions relative to the adoption of the ordinance have not been complied with, the ordinance in controversy must be deemed to have been regularly adopted. Now, the ordinance under consideration appears affirmatively from the journal to have received a majority vote of all the members of the common council. This was sufficient to indicate its adoption: Laws 1898, pp. 101, 109, § 30.

4. The record as to the suspension of the rules is not required by the charter to be kept in the journal, and, if it were at all material to the present controversy, the record of the yeas and nays on the suspension of the rules kept by the common council upon slips attached to the ordinance is amply sufficient to show a compliance with the rules. It was the method employed by the common council for keeping the record, and, being by it deemed sufficient for the purpose, the courts will not intervene to hold it void.

5. It is next contended that the common council was not empowered to adopt the ordinance. The delegated power is "to prevent and suppress gaming and gambling houses, or places where any game in which chance predominates is played for anything of value." This is unquestionably broad enough to authorize the common council to prevent the setting up or keeping of any house or place for the purpose of selling lottery tickets or certificates depending upon the event of a lottery, which is essentially the purpose of section 2 of the ordinance in question. The setting up or keeping of such a house is in itself an overt act, and constitutes the offense, the object of the charter being to prevent and suppress gambling houses. Lottery, it has been held, is a gaming device (*Ex parte Kameta*, 36 Or. 251, 60 Pac. 394, 78 Am. St. Rep. 775), and the keeping of a house for the purpose of selling lottery tickets is as much within the spirit and intentment of the charter as if it was kept for any other kind of gambling.

6. Another objection urged to the ordinance is that the acts prohibited thereby are not declared to be crimes or misdemeanors, or even to be unlawful. A penalty, however, is prescribed for their violation, and this is all that is necessary to notify persons of the unlawful character of the offense.

Limits

*I don't know
if this is
the same
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one in the
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or not.*

*Record book
or 16*

7. The next and last objection preferred is that the auditor did not attest the ordinance as "Auditor of the City of Portland," as he is styled in the charter: Laws 1898, pp. 101, 119, § 46. Manifestly, the answer to this is that neither the signing nor the attestation of the ordinance by the auditor is essential to its validity under the charter. It might be, and no doubt is, convenient, and perhaps essential, to identify the ordinance in its transmission to the mayor and return to the council body that he attest it, or place upon it his file mark; but we are not aware that any such formality is required in order to complete its perfect enactment, so as to give it the force of law.

These considerations affirm the judgment of the trial court, and such will be the order of this court.

Affirmed.

PEVEY v. AYLWARD. 49

1910. 205 Mass. 102.

KNOWLTON, C. J. This is a petition for a writ of *mandamus* to prevent the respondent Aylward from acting as city solicitor for the city of Cambridge, and to compel recognition of the petitioner's alleged right to that office. The question turns upon the validity of Mr. Aylward's election, which was declared by the common council in concurrence with the board of aldermen on June 29, 1909. It is not now contended that the election was invalid because it was not held in the month of April, according to the requirement of the St. 1891, c. 364, § 20. See *Rutter v. White*, 204 Mass. 59; *Cheney v. Coughlin*, 201 Mass. 204.

On June 29, 1909, this respondent was legally elected by the board of aldermen, and notice of his election was sent to the common council. The statutory provision is as follows: "In the year one thousand nine hundred and eight, and every third year thereafter, in the month of April, the city council, by concurrent vote, the board of aldermen acting first, shall elect a solicitor for the city of Cambridge," etc. St. 1891, c. 364, § 20, as amended by St. 1907, c. 491. By the R. L. c. 26, § 7, it is provided that "no election of a city officer by a municipal body or board shall be valid unless made by a *viva voce* vote, each member who is present answering to his name when it is called by the clerk or other proper officer, stating the name of the person for whom he votes, or that he declines to vote."

The first objection of the petitioner to the election is that it was in violation of § 21 of the Joint Rules and Orders of the City Council, which provides that every ordinance and every order requiring concurrent action shall, after passing one board, remain in the possession of the clerk of that board for thirty-six hours. This is to give an opportunity for a motion for reconsideration, according to the later provision of the same section, and provisions on the same subject in

§18 of the Rules of the Board of Aldermen, and §17 of the Rules of the Common Council. But these rules are not applicable to the election of a city solicitor, under the requirement of the statute. Such an election is not an ordinance or order, within the meaning of the rule. Section 21, after the requirement stated above, provides that if no motion for reconsideration is entered, the ordinance or order shall be sent to the clerk of the other board, who shall cause the same to be printed in the calendar, etc. In this case there was no ordinance or order. There was a vote upon an oral motion, in the board of aldermen, to proceed to the election of a city solicitor. Then an election was had in the manner prescribed by the statute. The result was recorded and notice of what had been done was sent to the common council. The proceeding is not within the definitions of orders and ordinances in §§1, 2 of the joint rules,¹ nor is it within the meaning and object of §21. This objection of the petitioner is not well founded.

The next question arises upon proceedings after a motion to adjourn in the common council. The record is as follows:

"At this time Councilman Beane submitted a motion 'That the Common Council do now adjourn.'

"The President ~~declared this motion to be carried~~, and immediately left the chair.

"The vote on this motion was doubted.

"Councilman Nelligan assumed the chair at once, and Councilman Murphy submitted a motion that Councilman Nelligan be chosen President temporarily.

"This motion was declared to be carried.

"On motion of Councilman Trodden, a committee consisting of Councilman Horan and Councilman Murphy was appointed to wait on the President and request him to resume his duties.

"This committee reported that they were unable to find the President.

"The aforesaid communication from the Board of Aldermen giving notice of the election of James F. Aylward as City Solicitor, was then read by the President *pro tempore*.

"Councilman Horan submitted a motion that the Common Council proceed to the election of a City Solicitor.

"This motion was declared to be carried.

"The roll of members was called by the clerk and each member present announced his choice for City Solicitor as follows:" Then follows the record of the vote of each member present, showing twelve votes for the respondent Aylward and two for the petitioner, and

¹ The sections referred to are as follows:

"Section 1. All by-laws passed by the city council shall be termed ordinances; and the enacting style shall be, 'Be it ordained by the city council of the City of Cambridge.'

"Sect. 2. In all votes, by which either or both branches of the city council express anything by way of command, the form of expression shall be, 'Ordered'; and whenever either or both branches express opinions, principles, facts or purposes, the form shall be 'Resolved.'"

*Pres. decl. of
motion adjourn
+ C. V. +*

*This decl.
was carried
without a vote.*

*Council
proceed
to elect
Aylward.*

1 The sections referred to are as follows :

"Section 1. The president shall call the council to order at the hour to which it has adjourned, and a quorum being present, shall proceed to the regular order of business. In the absence of the president, the clerk, and in his absence, the senior member present, shall call the council to order, and preside until the president *pro tempore* is chosen by ballot. A plurality of votes shall elect.

"Sect. 2. The president shall declare all votes. If any member doubts the vote, the president, without further debate upon the question, shall require the members voting in the affirmative and negative to rise and stand until they are counted."

irregular, its meaning was plain, and seemingly, it was by the unanimous consent of all the members present. It was, therefore, as effectual as if it had been regular. See *Attorney General v. Remick*, 73 N. H. 25; *Hicks v. Long Branch*, 40 Vroom, 300, 303; *Putnam v. Langley*, 133 Mass. 204; *Wood v. Cutter*, 138 Mass. 149. *Wheelock v. Lowell*, 196 Mass. 220, 230. *Sinclair v. Mayor of Fall River*, 198 Mass. 248, 256.

Irregularity of election by urban council.

The attempt to adjourn having thus been disposed of, the election was valid. It was agreed to, not only by a majority of the members present, but by a majority of the members of the whole common council. Even if there had been irregularities in the election itself, unless they were such as to defeat or render doubtful the expression of the will of the voters, the court would desire to give effect to the action of the majority. *Attorney General v. Campbell*, 191 Mass. 497, 502. *Blackmer v. Hildreth*, 181 Mass. 29, 32. *Commonwealth v. Smith*, 132 Mass. 289, 296. *People v. Wood*, 148 N. Y. 142.

As the respondent Aylward was legally elected, the right of the petitioner, who was holding over after the expiration of his term of office until his successor should be chosen, was thereby terminated.

Petition dismissed.

b. ADMINISTRATIVE.

ELLIOTT v. CHICAGO.

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1868. 48 Ill. 293.

BRESE, J. This was an application by A. H. Heald, city collector of the city of Chicago, to the Superior Court, for judgment against certain lots in that city, assessed for certain improvements on Michigan avenue.

assessment roll

The appellant, Elliott, appeared, and made objections to the entry of any judgment against the property assessed in his name, on the grounds—1st, That no notice, as required by law, was given of the application for judgment. 2d. The commissioners willfully and fraudulently failed and refused to assess real estate, knowing the same to be specially benefited by the proposed improvement. 3d. Because all the material requirements of the city charter, as to the passing of the ordinance for (the improvement) and as to the acts of the commissioners of the Board of Public Works, and of the Common Council and officers of the city, have not been complied with. 4th. No notice, as required by law, was given of the meeting of the commissioners for the purpose of making the assessment; and 5th, no notice, as required by law, was given of the filing of the assessment roll with the city clerk, or the commissioners' intended confirmation thereof.

*assessment roll
failed to give
notice of prop
submitted.*

These objections were overruled, and judgment entered for the amount assessed, with one per cent per month since September 6,

1867, and costs, and an order entered that sufficient of the property assessed be sold to satisfy the judgment.

To reverse this judgment, Elliot appeals to this court.

In support of the second objection, appellant called several witnesses, who all concurred in testifying that other property on Michigan avenue, not assessed, was benefited by this proposed improvement, as thereby the value of the property was enhanced.

Had these witnesses occupied the position of the Board of Public Works, they, doubtless, acting on their own judgments and official oaths, might have assessed the property not included in the assessment by the commissioners. The commissioners were acting under oath, and were to be controlled by the judgment of none others but their own, and on their oaths have made their return that the lots assessed were specially benefited by the proposed improvement, and their judgment must stand, unless impeached for fraud, not the slightest proof of which is exhibited in this case. As matter of necessity, their judgments must control, else there could be no such improvements. If a board of public works, selected, as must be supposed, for their good judgment, integrity and general capacity, should, under their official oaths, declare by their report that certain property is specially benefited by a proposed improvement, can it be that their judgment shall be overthrown by the testimony of others no more intelligent and no more honest than they? The judgment of men greatly differs in almost every case demanding its exercise, and in cases like this, it must be shown it was unfairly or fraudulently exercised, to authorize a court to nullify it. Their judgment must be conclusive in the absence of all fraud. *City of Chicago v. Burtice*, 24 Ill. 489.

The other objections have no foundation. All the material requirements of the law have been substantially complied with, and all the proceedings, from their inception to the final judgment, have been regular, and in accordance with the charter.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

TAPPAN v. SCHOOL DISTRICT No. 1.

1880. 44 Mich. 500.

GRAVES, J.¹ August 31, 1878, the defendant's trustees entered into a written contract with Tappan to hire him to teach defendant's school for the term of forty weeks beginning on the first day of the school year, September 2d, at \$50 per month and board himself. The school was organized as a graded one in 1878 and so remained. He began teaching under the contract on the second of September and

¹ Part of the opinion is omitted.—Ed.

continued two days. He was then dismissed by defendant's trustees, but no cause was expressed. September 24, 1879, he brought this action for damages. The circuit judge heard the case upon the facts and refused to allow a recovery.

It is said that the trustees who contracted with Tappan were not empowered to hire for any time beyond the current school year to expire on the arrival of the annual meeting, September 2d, and that the contract so made on the 31st of August was not binding on the district after September first.

In the case of graded schools the trustees are not annually renewed. The Legislature has seen fit to give the board more permanence. One-third only or two out of six go out yearly. A purpose to secure an administration for these branches more stable and efficient in the interest of education than is very common under the general law, is plain enough, and there is no implication of a design that the power of the board should be so fettered that no teaching to commence on the first day of the school year could be lawfully contracted for until the annual meeting on that day should be closed. On the contrary, it may be fairly argued that the Legislature contemplated that these schools would generally open on the beginning of the school year, and that the teachers would have to be contracted with in season therefor, and that some time would be necessary to enable the trustees to perform with due care the important duty of selecting and hiring. It is scarcely necessary to enlarge upon the question. The contract appears to have been within the power of the trustees, and the record discloses nothing to impeach it. Neither the trustees nor the voters at the annual meeting had power to impair its obligation. Whether they resolved or not that none but female teachers should be employed is not important.

*Legis. contemplated
H. J. - original
N.*

PEOPLE EX REL. ALLEN v. WELLES. 52

1895. 14 N. Y. Misc. 228.

OSBORNE, J. This is a proceeding by *certiorari* to review the action of the respondent, as commissioner of police and excise, in dismissing the relator from the police force.

By the charter of the city of Brooklyn (Chap. 583, Laws of 1888. tit. 11, § 9) the commissioner of police and excise was authorized "to make such rules, regulations and orders for the government of the police force as he may deem proper," and he was also authorized (§ 15), on conviction for violation of rules, etc., to punish by dismissal from the force.

It appears from the return to the writ that, on or about October 23, 1893, Hon. Henry I. Hayden, the then commissioner, caused to be

*6-1 police
1-11-11 adopted
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adopted, issued and published certain rules and regulations for the government of the police force, and these rules have never been repealed.

One of such rules (Rule 12, § 5) required each patrolman to remain on his post "until the time assigned for the expiration of his tour of duty," except in certain specified cases not relating to the matters in issue here.

Another of said rules (Rule 25, § 5) forbade any member of the force becoming intoxicated, and further provided, in addition to being suspended and reported, that, in case "he became violent, disorderly, or unable to take care of himself, he should be detained as a prisoner and taken before a magistrate at the next sitting of the court."

On December 18, 1893, the relator was appointed a patrolman of the police force, and at about that time a copy of the said rules and regulations was furnished him.

On or about February 1, 1894, the respondent was duly appointed commissioner of police and excise, in place of Mr. Hayden, whose term of office had expired.

On January 24, 1895, charges were preferred by the captain of his precinct, against the relator, for a violation of both of the above-mentioned rules, and he was also taken before Police Justice Haggarty on a charge of intoxication.

The relator appeared in person and by counsel before the commissioner in answer to said charges; a trial was had, witnesses examined on both sides, and, after deliberation, the commissioner adjudged the relator to be guilty of both of the charges preferred against him, and dismissed him from the police force. The relator now seeks, by writ of certiorari, to review this determination of the commissioner and to have it reversed.

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The learned counsel for the relator urges that, as the present police commissioner had never adopted as his own and promulgated the rules and regulations issued by his predecessor, there were no rules of the department in existence under which the relator could be disciplined by the present commissioner. This contention cannot be sustained. The police department is a continuous body, and, while the executive head thereof may be changed from time to time, such change never contemplated the readoption of all previous rules and regulations in order to make them binding on the force; those rules and regulations stood, not as the act or declaration of an individual, but of the official head of the department, and they continued to be binding on the police force till altered or repealed by the proper authority.¹

¹ The remainder of the opinion is omitted. — Ed.

McCORTLE v. BATES. 53

1876. 29 Ohio St. 419.

MOTION for leave to file a petition in error to the District Court of Noble county.

The original action was brought by the plaintiffs against Bethel Bates, Andrew J. Moore, Josephus Groves, E. H. Craft, and I. Q. Morris, in the Court of Common Pleas of Noble county.

The following are the facts, so far as they are material to be noticed:

On the 13th day of October, 1870, the defendants were members of the board of education of Seneca township, in said county, and on that day they entered into an agreement in writing with one J. S. Wachob, of which the following is a copy:

"Mr. J. S. Wachob is hereby requested to forward to Herman Suabidissen, township clerk, the following list of articles, viz: Seven excelsior globes, seven inches in diameter, mounted as per cut herewith, provided a majority of the members of the board of education of Seneca township, Noble county, Ohio, sign this order; and we hereby agree to pay for the same on or before the first day of September, 1871, with interest, at the price hereto annexed.

"The township clerk is hereby directed to issue an order on the township in the payment for the same in favor of said Wachob, payable as above specified, and he is further requested to call a special meeting of said board within ——— days, at which meeting we agree with each other that we will ratify this contract.

"BETHEL BATES,
"ANDREW J. MOORE,
"JOSEPHUS GROVES,
"E. H. CRAFT,
"I. Q. MORRIS.

"October 13, 1870."

Then followed a long list of school apparatus with prices annexed, the price annexed to the globes contracted for being \$15 each. The globes were delivered to the township clerk, who drew an order on the treasurer of the township, as directed, for \$105, in favor of Wachob, payable September 1, 1871. This order and Wachob's interest in the above-recited agreement were assigned by him to the plaintiff, after which the board of education, acting in its corporate capacity, repudiated the contract, and the treasurer refused to pay the order; whereupon the plaintiff brought his action against the members of the board signing the contract to recover upon their alleged individual promise to pay for the globes. The defendants demurred to a petition stating the foregoing facts, upon the ground that the facts stated were

Wachob's list of
articles annexed
to the contract
of Oct. 13, 1870.
The board of
education refused
to ratify the
contract at their
meeting.

Ed. S. Bates
repudiated R.

The
plaintiff
brought his
action against
the members of
the board.

insufficient to constitute a cause of action. The demurrer was sustained, and the petition dismissed. On error, the district court affirmed the judgment of the common pleas. Leave is here asked to file a petition to reverse both judgments.

BORNTON, J. The contract sued upon having none of the attributes or immunities of commercial paper, the plaintiff, by the assignment by Wachob of his claim against the defendants, secured and succeeded to such rights, and such only, as Wachob possessed at the time of the transfer.

Such defenses as would have been allowed had he retained the claim and brought suit upon it himself, are now admissible against the plaintiff. Assuming, without deciding, that by the understanding of the parties to the agreement the defendants incurred a personal liability, it is quite clear that there was no error in the action of the common pleas in sustaining the demurrer and dismissing the petition.

The request to Wachob to forward the globes, provided a majority of the board signed the order; the agreement to pay for the same on or before September 1, 1871; the direction to the township clerk to "issue" an order on the township in favor of Wachob for the amount agreed upon; the request to the clerk to call a special meeting of the board for action upon the matter, and the agreement among the members signing the contract to ratify the same at such meeting, were all elements of the same transaction. The paper on which they were written contained the price-list of school apparatus belonging to Wachob, and it was delivered to him after it was signed by the defendants. He was not only cognizant of its contents, but a party to its stipulations. The promise or agreement of the members of the board, inter sese, to ratify the contract at the meeting to be called, was to the knowledge of Wachob a material inducement to the agreement to purchase, and made for his benefit. He accepted an order drawn on the treasurer in anticipation of such ratification. It was an agreement to avoid or evade personal liability, if any was incurred, by shifting it to the township. It is not unlike, in its legal aspect, a promise or agreement by a legislator, or member of a city or town council, to act and vote upon a pending measure, in a certain way, for a consideration paid. Such promise or agreement was clearly contrary to public policy, and therefore illegal and void. Its effect is to vitiate the whole instrument.

The board is constituted, by statute, a body politic and corporate in law, and as such is invested with certain corporate powers, and charged with the performance of certain public duties. These powers are to be exercised, and these duties discharged, in the mode prescribed by law. The members composing the board have no power to act as a board, except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for that purpose, all their official proceedings. They have, in their corporate capacity, the title, care, and custody of all school

Individual
agreement void
as public policy

property whatever within their jurisdiction, and are invested with full power to control the same in such manner as they may think will best subserve the interest of the common schools and the cause of education. They are required to prescribe rules and regulations for the government of all the common schools within the township. Clothed with such powers, and charged with such duties and such responsibilities, it will not be permitted to them to make any agreement among themselves, or with others, by which their public action is to be, or may be restrained or embarrassed, or its freedom in any wise affected or impaired. The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of, and upon, the public matters intrusted to them, in the session provided for by the statute. This cannot be when the members, by pre-engagement, are under contract to pursue a certain line of argument or action, whether the same will be conducive to the public good or not. It is one of the oldest rules of the common law, that contracts contrary to sound morals, or against public policy, will not be enforced by courts of justice—*ex facto illicito non oritur actio*; and the court will not enter on the inquiry, whether such contract would, or would not, in a given case, be injurious in its consequences if enforced. It being against the public interest to enforce it, the law refuses to recognize its claim to validity.

Can't impair
freedom
to perform
public duties
in session
provided for by st.

Leave refused.

PEOPLE EX REL. HOFFMAN v. BOARD OF EDUCATION. 54

1894. 143 N. Y. 62.

EARL, J.¹ The relator was principal of one of the public schools in the city of New York, and she was fined by the board of education "fifteen days' pay for disobeying the instructions of the city superintendent"; and she instituted this proceeding by certiorari to review and reverse the imposition of that fine. She claims that the board had no authority to impose the fine, and in this we think she is clearly right.

School principal
fined for
disobeying
instructions
of Supt.

The imposition of a fine is a species of punishment, and before any body, tribunal or officer can impose it, authority therefor must be clearly found in some statute.

Sections 1022 and 1026 of the New York City Consolidation Act of 1882 provide that the board of education "shall have full control of the public schools and the public school system of the city, subject only to the general statutes of the state upon education"; and this is the sole provision of law invoked by the respondents as authority for the imposition of the fine. Under it the board of education may

Can't impose
fine without
authority
of statute

¹ Arguments omitted. — Ed.

establish schools, regulate the course of instruction therein, and shape the entire educational system for the city. It may provide for the discipline and government of the scholars in the schools. But could it impose pecuniary fines upon them for any misconduct or dereliction, and thus deprive them of their property? Could it imprison them or sit in solemn judgment upon them and order the infliction of corporeal punishment? If it could not do these things, much less could it discipline or punish teachers in these ways. The relator never in any way submitted herself to such a jurisdiction, and there is no general law which confers it. If the board could thus deprive her of fifteen days' pay, where is the limit? Why could it not deprive her of one month's pay or a whole year's salary already earned? If it could compel her to forfeit money already earned, why could it not enforce a fine against her other property? If the board has such a power, where are its limits and who is to define them?

If the board had adopted by-laws for the regulation of the schools and the teachers therein, and the relator had assented to them, then they might have become binding upon her as part of her contract with the board, and under such by-laws it might have had power of discipline and control over teachers which it could not otherwise have or possess. But here there was no by-law, rule or regulation known or assented to by the relator under which any fine could be imposed upon her. The board of education can, under certain conditions mentioned in the laws, remove teachers, and by the exercise of that power it can protect the schools against the incompetency and the improper conduct of teachers.

The board of education is a quasi municipal or governmental corporation, and no such corporation has power to impose fines or to pass ordinances authorizing the imposition of fines without the clear authority of some statute. In Dillon on Municipal Corporations, secs. 345 and 348, it is said: "A corporation, under a general power to make by-laws, cannot make a by-law ordering a forfeiture of property. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that such authority must be expressly conferred by the legislature." "In this country, inasmuch as corporations derive all their power from charter or act of the legislature, the right to inflict a forfeiture must be plainly given, and cannot be derived from usage." In *Kirk v. Nowill* (1 T. R. 124) the question was whether a corporation which possessed a general power to make by-laws could make a by-law creating a forfeiture, and Lord MANSFIELD held that no corporation possessed such an extraordinary power unless it was expressly given; and Mr. Justice BULLER also said that construing it a by-law creating a forfeiture, the act of Parliament not having given the corporation power to make such a by-law, it was bad on that ground; and a similar doctrine was laid down in *Hart v. Mayor, etc.* (9 Wend. 571, 588), and *Dunham v. Rochester* (5 Cow. 462), and in many other cases. This fine was in

The limit to
disciplinary power
is not infinite.

Where by-laws
assented to by
teachers, they
become part of
K.

the nature of a forfeiture, if valid, as it compelled the relator to forfeit a portion of her salary earned.

As this fine was imposed upon the relator without authority it could do her no harm, and could not stand in the way of the collection by her of her salary as a teacher, and, therefore, it may well be doubted whether she could properly institute this proceeding by *certiorari* to review and reverse the utterly void and harmless proceeding of the board of education. But as this proceeding was entertained in the court below, and no objection has been made to its propriety, we will assume that it was proper; and our conclusion is that the order of the General Term and the proceeding of the board of education imposing the fine should be reversed and set aside, with costs to the relator in this court and the court below.

SECTION III.—*Officers.*

STATE EX REL. STAGE v. MACKIE. 53

1909. 74 Atl. 759.

APPEAL from Superior Court, New Haven county; GEORGE W. WHEELER, Judge.

Information in the nature of quo warranto by the State, on the relation of Otto G. Stage, against Robert Mackie. There was a judgment ousting respondent from office and affirming the right of relator to it, and respondent appeals. Error, and judgment set aside.

The charter of the city of Waterbury provided that its board of aldermen might, in a manner prescribed, make ordinances "to provide for the appointment of a building inspector and to prescribe his duties." It also conferred upon the board "the power to provide for the appointment or election of such employes as are not otherwise provided for, and as may be required for the proper transaction of the business of the city, and to prescribe their duties and compensation." Having this authority, the board adopted an ordinance creating the office of building inspector, and defining the powers and duties of its incumbent. It was also provided that there should be a deputy building inspector, that he should act in place of the building inspector and exercise all of his powers during the latter's absence or disability, and in the event of the latter's death perform all of his duties until an appointment should be made to fill the vacancy, that he should be biennially appointed by the board in the month of January of the even numbered years, and that he should hold office for two years from the first Monday of February next following his appointment, and until his successor was duly appointed and qualified.

Under this ordinance one Smith was appointed for the term of two years from the first Monday of February, 1904. In April, 1905, the

General Assembly passed a special act (14 Sp. Laws, p. 619), which provided that the building inspector and assistant building inspector of the city of Waterbury then in office should hold their respective offices during good behavior subject to a power of removal in a manner prescribed. Smith died March 5, 1906, and the board in June elected the relator deputy building inspector to fill Smith's unexpired term. The relator thereupon qualified and entered upon the duties of the position. January 20, 1908, the board proceeded to the election of a deputy building inspector for the term of two years from the first Monday of February next following. The votes of the entire board were cast for the respondent, who was a member of the board, present, and voting for himself, and he was declared appointed. The respondent thereupon qualified, and entered upon the duties assigned to said position, which he has since continued to perform to the exclusion of the relator. The board of aldermen took no action declaring said position vacant, or creating a vacancy therein, except said appointment of the respondent. The relator made ineffectual demand of the respondent for the office, which is one of profit. The relator claims the office, contending that his appointment thereto was one at the will of the board of aldermen, and that the board has taken no lawful action terminating his term. He contends that the attempted appointment of the respondent as his successor cannot have the effect of either terminating his term or of entitling the respondent to succeed him, since the respondent was a member of the board of aldermen and voted for himself, and for the further reason that his duties as inspector of buildings would be incompatible with his duties as an alderman.

PRENTICE, J. (after stating the facts as above). *Quo warranto* proceedings lie to prevent the usurpation of a public office or franchise. These were begun to try the title to a position attempted to be created by an ordinance of the city of Waterbury, and attempted to be filled by the board of aldermen of the city. They must fail for the reason that there is no such office. To justify a resort to the extraordinary remedy here invoked, there must be an office legally authorized and constituted. *State v. North*, 42 Conn. 79, 86; *Commonwealth v. Dearborn*, 15 Mass. 125; High on Extraordinary Legal Remedies, § 625. The position in question is one to which the ordinance creating it attempted to attach important powers and functions of government belonging to the sovereignty, and therefore was a "public office," as distinguished from a mere employment or agency resting on contract, and to which such powers and functions are not attached. *Perkins v. New Haven*, 53 Conn. 214, 215 1 Atl. 825; *Seymour v. Over-River School District*, 53 Conn. 502, 509 3 Atl. 552; *Rylands v. Pinkerman*, 63 Conn. 176, 182, 28 Atl. 110, 22 L. R. A. 653. "A public office is a right, authority, and duty created and conferred by law, by which . . . an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public." Mechem on Public Officers, § 1. "It implies a delegation of

Respondent elected to succeed him.

Contest fails as is no such office, existing.

Public office not mere employment.

a portion of the sovereign power to and possession of it by the person filling the office." *United States v. Hartwell*, 6 Wall. 385, 393 (18 L. Ed. 830); Opinion of the Justices, 3 Greenl. (Me.) 481, 482; *Patton v. Board of Health*, 127 Cal. 388, 394, 59 Pac. 702, 78 Am. St. Rep. 66. It is a trust conferred by public authority for a public purpose, and involving the exercise of the powers and duties of some portion of the sovereign power. *Clark v. Easton*, 146 Mass. 43, 45, 14 N. E. 795; *Attorney General v. Drohan*, 169 Mass. 534, 535, 48 N. E. 279, 61 Am. St. Rep. 301; *People v. Kipley*, 171 Ill. 44, 71, 49 N. E. 229, 41 L. R. A. 775. Such being the nature of a public office, it is apparent that its source must in this country be found in the sovereign authority speaking through Constitution and statute. The creations of the sovereign power cannot, in the absence of a delegated authority, create one. *High on Extraordinary Remedies*, § 426; *State v. Spaulding*, 102 Iowa, 639, 647, 72 N. W. 288; *Patton v. Board of Health*, 127 Cal. 388, 393, 59 Pac. 702, 78 Am. St. Rep. 66; *Miller v. Warner*, 42 App. Div. 208, 209, 59 N. Y. Supp. 956; *Commonwealth v. Swasey*, 133 Mass. 538, 539.

Source of public office must be in sov. auth.

The source of the alleged office here in controversy is a city ordinance. The state had delegated to the city in its charter the power to provide for the appointment of a building inspector, and to prescribe his duties. 12 Sp. Laws 1895, p. 438, § 21. It had not delegated the power to provide for the appointment of a deputy building inspector, and to prescribe his duties. The city was without inherent power to create such a public position and to endow it with the jurisdiction and authority attempted to be conferred. No such power was impliedly granted by the charter provision referred to. The right to create one office does not imply the right to create two. The right to provide for the appointment of an officer does not involve or imply the right to provide for substitutes and alternates ad libitum. The right to prescribe the power and duties of a designated official, and to endow him with that power, does not carry with it the right to endow several persons in the alternative with that power.

No power, direct to city to appoint deputy.

The charter provision giving the board power to provide for the appointment or election of employes, and to prescribe their duties and compensation, was also inadequate as a conferment of authority to create public offices, to provide for the choice of incumbents, and to endow those incumbents with portions of the sovereign power at pleasure. This provision was limited in its application to employes, and its language was chosen to clearly indicate that fact. It is scarcely conceivable that the state should have delegated to one of its creations its sovereign power in any such wholesale way as to enable the latter to create such offices as it pleased, and attach to them the exercise of such portions of the sovereign power as it pleased, and thus surrender to its creature its power of direction and dictation, and the charter provision referred to was too carefully guarded in its language to give countenance to such a contention.

No auth. to appoint employes.

It might possibly be a wise precaution to provide for the contingency of the death, absence or disability of the single official for which the sovereign authority has provided; but that is a matter for which that authority is alone qualified to deal. It has not done so save as the special act of 1905 concerned the matter. Whatever may have been the effect of that act during the lifetime of the then incumbent, it could not have amounted to a ratification of the city ordinance, as permanent legislation, creating the office of deputy or assistant building inspector, and defining the powers and duties attached to it.

There is error, the judgment is set aside, and the cause remanded for the rendition of a judgment dismissing the information. The other Judges concur.

PEOPLE EX REL. FITZPATRICK v. FRENCH. 56

1884. 82 Hun. 112.

CERTIORARI to review the action of the board of police commissioners in removing the relator from the police force.

DAVIS, P. J.¹ The relator was tried upon a charge of "conduct unbecoming an officer." The specification was, in substance, that the relator on the 14th of April, 1883, "during his tour of patrol duty, pretended that the window of a drinking saloon, No. 16 Dutch street, had been burglariously broken by some person unknown and a short time after entered the said saloon and wrongfully broke open boxes containing cigars, the property of the owner of the saloon, and surreptitiously, without consent of the owner, took and carried away in his pocket one hundred and sixteen cigars, which were subsequently found upon his person when he was searched and identified by William A. Jennings, the proprietor of said drinking saloon, as his property."

It is not asserted that there was any irregularity in form in the proceedings and trial of the relator, but it is insisted: First. That the charge imported a criminal offense of either burglary or larceny, which the commissioners had no jurisdiction to try; and second, That the evidence was not sufficient to justify a conviction of any offense, or of "conduct unbecoming an officer."

The other question of the case is whether the commissioners had jurisdiction to try the charge set out in the specification. This question arises only upon the assumption that the specification set out a criminal offense, for which the relator might be indicted and tried in a court of justice, and that therefore he could not be tried and removed by the commissioners until he had been convicted on trial by a criminal court.

¹ Part of the opinion only is given.—Ed.

This argument, it is manifest, altogether rests upon the idea that the inquiry of the board of police contravenes the provisions of the Constitution which secure to persons accused of crime the established modes of trial upon indictment and before a court and jury in the higher classes of crime, and the procedure in and by courts with or without jury in the lower grades. But it ignores the fact that the investigation of the police board is not such a trial and entails no such consequences upon an accused party. It is precisely analogous to the investigation by any other corporate body of the fitness of its servants to remain in charge of the duties they are appointed to perform, or of members of the corporate body to continue in that relation. The city of New York is a public corporation. The police department is one of the agencies through which its functions are to be performed; and no court has ever held that the heads of that department cannot be removed upon adequate grounds in the manner the legislature may see fit to prescribe. But the argument is that if he be a murderer, or felon, or criminal of any grade, the legislature cannot authorize his removal by any authority until he has first been indicted, tried and convicted and sentenced by a constitutional court of justice in the forms preserved by the Constitution. It is not well to confuse the powers of administrative or executive bodies to remove subordinates for any conduct showing unfitness for place or position, with the proceedings of courts of justice to punish crimes. They are essentially different in their objects, and may and do exert and move in their respective spheres without collision or inconsistency. If it be true that a policeman guilty of felony cannot be removed by the board till after his conviction and sentence in a court of justice, because of constitutional prevention, then some astute lawyer will speedily insist that a felon cannot be removed at all for crime, because the same constitutional safeguards provide that he shall not be twice tried or punished for the same offense. The answer will be that a conviction of felony forfeits all public office; but not so of misdemeanors, and where the convict has paid the penalty imposed by the court, why should he not interpose the plea of *autrefois convict*, when the police board arraign him for trial and another punishment? It has been seen that legal offenses are all grades of crime. Let us consider for a moment the effect of the construction given to the section authorizing trial by the board of police, which requires conviction by a court of justice before removal or any other punishment. A policeman when arraigned before the board in such a case may always answer to the offense, "I am charged with a crime, you must arrest your proceedings till I am convicted in court"; and then if the board venture to proceed, a writ of prohibition must issue from the court for want of jurisdiction in the board. The policeman may never be indicted or even arrested for the offense, or never brought to trial in court; but that makes no difference with the question of jurisdiction of the board, since conviction in court is a condition precedent; and so the police force may

Police investigation,
not a trial.

Can be removed
by the board
trial or conviction
in court preceding

grow in time into a body of accomplished criminals, whom the commissioners cannot remove nor suspend, nor withhold their pay, nor even reprimand, because the dilatory or over-crowded courts do not bring them to trial and conviction. And again, if a policeman guilty of any crime, however monstrous, can slip through the meshes of the law on some technicality, he can laugh at both courts and commissioners and hold his office by the absolute title of an unconvicted policeman. When we consider the vast scope of the phrase "legal offenses," we shall be able to estimate the possible, if not probable, consequences of such a rule as is laid down in Siebert's case. Every misdemeanor as well as every felony triable by any court is within its significance; and as every willful neglect of duty by a public officer is a misdemeanor, the power of the board to remove before conviction is reduced substantially to cases of accident, where there should perhaps be no removal at all. The offender could defeat jurisdiction in all cases by showing that his offense was willful, or that he violated the rules intentionally, or that he purposely was guilty of the "conduct injurious to public morals."

Every policeman charged with crime, who could get out on bail, no matter what his offense, nor how clearly provable, could still walk the street clad in a policeman's uniform, with authority to club his fellow citizens till his trial should come off; or, if unable to get bail, his absence from duty while in jail awaiting trial, being enforced by law, would be excusable absence and not prejudicial to his right to hold the office or draw his salary.

The argument *reductio ad absurdum* is in this case valuable because it shows so forcibly the dangers to which the contrary view exposes the public peace and safety in their most vulnerable point. Nothing can be more important than a competent and faithful police force in our city, and nothing therefore is more necessary than that the heads of the department should be clothed with the most ample and summary authority, upon conviction, to remove the members of the force who are guilty of any legal offense, or of acts dangerous to the morals or peace of the public.

We have therefore no hesitation in saying that, both in reason and in law, the board of police have power, in the form prescribed by statute, to examine into all offenses committed by policemen, for the purpose of purifying or disciplining the force, without restriction or limitation based upon the criminal character or other heinousness of the crime.

We think the proceedings of the board in this case should be affirmed, and the writ dismissed, with costs.

HAGERTY v. SHEDD. 57

1909. 75 N. H. 393.

BINGHAM, J. The first proceeding is a petition for a writ of *certiorari*, directing the mayor and aldermen of the city of Nashua to certify the records of their proceedings in removing Hagerty from membership in the board of public works of the city, and asking that their order removing him from office be decreed null and void. The second is a petition for a writ of *quo warranto* to oust the defendant Crowley from membership in the board of public works, he having been appointed by the mayor and aldermen of the city to fill the vacancy caused by the removal of Hagerty, and having qualified and entered upon the duties of the office. In the superior court the writ of *certiorari* was granted and the record and proceedings of the mayor and aldermen in removing Hagerty from office were quashed and adjudged void, and the defendants excepted. In the *quo warranto* proceeding the trial judge found that the defendant was usurping the office from which Hagerty had been removed, and declined to allow the defendant to show the real cause upon which the mayor and aldermen acted in making the order of removal, and the defendant excepted.

The various contentions of the parties in these cases depend largely upon the decision of the question of the capacity in which the mayor and aldermen acted in removing Hagerty from office. If their powers were administrative and not judicial, there would be no occasion for a writ of *certiorari* to correct the record or set aside the proceedings. *State v. Richmond*, 26 N. H. 232, 236. In such case the record might be amended to conform to the facts, on motion made for that purpose in any proceeding where it was brought in question. If, however, their powers were judicial, the mayor and aldermen having jurisdiction of the subject-matter upon which they acted, there may have been and probably was occasion for a writ of *certiorari* to set the proceedings aside, although they were summary, without preferment of charges, notice and hearing. *Gibbs v. Manchester*, 73 N. H. 265, 267. But if the fact that the proceedings were summary would render them subject to attack collaterally, that would not constitute a valid objection to a direct proceeding to set them aside. "Indeed, it may be regarded as settled, that though a party has a right to treat the proceedings of an inferior tribunal as nullities in a collateral proceeding, he may, nevertheless, maintain a *certiorari* to set them aside." *State v. Richmond*, 26 N. H. 232, 237.

It appears that Hagerty's appointment was legal, and that his office carried a fixed salary and was for a term of three years. The statute under which the removal was made reads as follows: "The mayor, with the advice and consent of the majority of the full board of aldermen, may remove any member appointed as aforesaid for cause." Laws 1909, c. 283, § 2. If the word "cause," as here used, means legal

cause and after notice and hearing, the statute confers judicial powers and means the same as though it read "for cause, after notice and hearing." *Gibbs v. Manchester, supra.*

In *Shannon v. Portsmouth*, 54 N. H. 183, the action was assumpsit to recover compensation for the services of the plaintiff as a constable and police officer, from July 17 to December 15, 1870. He was duly appointed a constable and police officer of Portsmouth January 13, 1870, and qualified and served as such down to July 7 of that year. He was then notified to appear before the mayor and aldermen to answer charges verbally preferred against him, appeared, and was heard. Thereupon the mayor and aldermen voted that he be suspended from duty. From that time down to December 15, 1870, when he was reinstated, he was not permitted to perform the duties of his office, although ready and willing at all times to do so. At the trial he offered to prove that there was no sufficient cause for his removal or suspension, but the evidence was excluded and a verdict found for the defendants, subject to exception. The provision of the charter of Portsmouth under which the action was taken reads as follows: "They [the mayor and aldermen] shall have full and exclusive power to appoint a city marshal and assistants, constables, and all other police officers; . . . and to remove the same from office for sufficient cause, the mayor and aldermen each having a negative on the other, both in the appointment and removal of officers." Laws 1849, c. 836, § 13. In construing the act it was held: (1) That the power to remove included the power to suspend; (2) that the evidence offered for the purpose of showing that the cause for which the plaintiff was suspended was not a legal cause was properly excluded, for the reason that the suspension proceedings were judicial and could not be attacked collaterally; that "if the validity of the suspension is disputed, the plaintiff's remedy must be sought in a proceeding for that purpose, which will put the legality of the acts of the mayor and aldermen directly in issue."

Although the reasoning in this decision may not be as explicit as could be desired, there can be no doubt as to its meaning, and that it was there decided that the power conferred on the mayor and aldermen by the charter, to remove and suspend police officers and constables for sufficient cause, was judicial. Such being the construction of a legislative act conferring power to remove for cause when chapter 283, Laws 1901, was enacted, it is to be presumed that the legislature, by making use of the same language or its equivalent in section 2, intended that it should be taken to confer like power. *Green v. Bancroft*, 75 N. H. 204, 206. Moreover, it is generally held that statutes authorizing the removal of officers for cause confer judicial powers on the body that is to exercise them, and that the word "cause" means legal cause, and contemplates a charge, notice, hearing, and judgment of removal upon cause. *Ham v. Board of Police*, 142 Mass. 90; *State v. Hoggan*, 64 Ohio St. 582; *Dullam v. Wilson*, 53 Mich. 392; *People v. Therrien*, 80 Mich. 187; *Hallgren v. Campbell*, 82 Mich. 255; *State v. Common Coun-*

cil, 53 Minn. 238; *State v. St. Louis*, 90 Mo. 19; *State v. Walbridge*, 62 Mo. App. 162; *S. C.*, 69 Mo. App. 657; *McCully v. State*, 102 Tenn. 509; *State v. Smith*, 35 Neb. 13; *Benson v. People*, 10 Col. App. 175; *State v. Hewitt*, 3 So. Dak. 187; *Biggs v. McBride*, 17 Ore. 640; *Osgood v. Nelson*, L. R. 5 H. L. 636; 1 Dill. Mun. Corp. (4th ed.), § 250; 2 Abb. Mun. Corp., § 636; Mech. Pub. Off., § 454; 29 Cyc. 1409.

The power of removal conferred upon the mayor and aldermen being judicial, the rejection of the offer to show that the cause for removing the plaintiff was a just and legal one, if erroneous, did not harm the defendants; for the proceedings were irregular and summary, without preferment of charges, notice, and hearing, and would not be cured by a finding that the cause of removal was just and legal.

*Proceedings summary
not cured by
finding that
cause was just.*

The position of the defendant Crowley, who was made a party to the *certiorari* proceedings, that he was entitled as a matter of law to prove that he had qualified as a member of the board of public works and entered upon the performance of the duties of his office at the time the petition for a writ of *certiorari* was served upon him, and to have the question whether he was a usurper determined in that proceeding, cannot be sustained. "The superintending power of the court is limited to the correction of errors of law apparent upon the record, or to requiring the body to act if they refuse to entertain a contest." *Sheehan v. Mayor and Aldermen*, 74 N. H. 445, 446. Matters outside the record as certified from the inferior tribunal cannot be considered. *Sheehan v. Mayor and Aldermen*, *supra*; *Richardson v. Smith*, 59 N. H. 517, 519; *Hayward v. Bath*, 35 N. H. 514, 521; *Landaff's Petition*, 84 N. H. 163, 173; *Osgood v. Nelson*, L. R. 5 H. L. 636; 3 Abb. Mun. Corp., § 1126.

Exceptions overruled.

All concurred.¹

STATE EX REL. ATTORNEY GENERAL v. JENNINGS.

53

1898. 57 Oh. St. 415.

MINSHALL, J.² It is averred by the attorney-general in the petition that James Jennings and others specifically named, having been and

¹ "The proceeding therefore must be instituted upon specific charges, sufficient in their nature to warrant the removal, and then, unless admitted, be proven to be true. Defendant might also cross-examine the witnesses produced to support the charges, call others in his defense, and in these and other steps in the proceeding be represented by counsel. In no other way could the person sought to be removed have a due hearing or 'an opportunity to be heard,' and this condition must be complied with before the power of removal is exercised. (*Reg. v. Smith*, 5 Q. B. 614; *Osgood v. Nelson*, 5 H. L. C. 636; *People v. Fire Com'rs*, 72 N. Y. 445). It follows, therefore, that the proceeding is judicial in its character, and, as a necessary consequence, is subject to review by a writ of *certiorari* issued in the Supreme Court by the exercise of its superintending power over inferior tribunals." Danforth, J., in *People v. Nichols*, 79 N. Y. 582, 588.

² Arguments omitted. — Ed.

are now unlawfully usurping and holding the offices of "firemen" in the fire department of the city of Newark, this state, and asks that they be ousted therefrom and that Frank Alexander and others, specifically named, and entitled thereto, be inducted into the offices so usurped.

The case has been submitted to the court on an agreed statement of facts, from which it appears that in 1895, the city council of Newark passed an ordinance organizing its fire department; and by which it was provided that it should consist of ten firemen, one of whom should be elected as chief by the appointment of the mayor with the advice and consent of the council, and provided for their compensation. The persons whose induction is asked for were appointed under the provisions of this ordinance. The chief is not included in the number and all were simply appointed as "firemen." On June 23, 1897, the council adopted an ordinance, repealing the former one, and providing for the employment of the "firemen" by the council, the chief, however, being appointed as formerly. The section as to the firemen is as follows: "The said council shall employ as many assistant firemen, from time to time, as to them may seem necessary, who shall receive for their services not to exceed \$50.00 per month." Afterwards the firemen appointed under the former ordinance were discharged by resolution of the council, and by another resolution the defendants were employed.

The contention of the relator is that a fireman is an officer, and therefore, under section 1711, Revised Statutes, which requires all officers of the municipality, not elected by the people, to be appointed by the mayor with the advice and consent of the council, the defendants, not being so appointed, have no right to the office, should be ousted, and the former incumbents inducted as officers holding over until their successors are duly appointed and qualified. We do not adopt this view. There is no question but that the council had the power to repeal the former ordinance; and this being so, and all the offices created by it, whatever they were, being thus abolished, the incumbents ceased to be officers, for there can be no incumbent without an office. *State ex rel. Flin v. Auditor of State*, 7 Ohio St. 333; *Gano v. State ex rel.*, 10 Ohio St. 238; *State ex rel. Hawkins*, 44 Ohio St. 98. So that the real question in the case is, whether a "fireman" is an officer; or, in this case, whether the firemen, for whose employment provision is made in the ordinance of 1897 are officers. For that a position in the fire department of a city may have such duties attached to it as to constitute an office is not questioned. The chief of a fire department performs such duties as make him an officer. But the character of an office cannot be attached to a position by a name merely. Whether it be an office or not, will depend upon the nature and character of the duties attached to it by law.

Many efforts have been made to define a public office; and it is only the incumbent of such an office whose rights can be challenged in a

proceeding in quo warranto. But it is easier to conceive the general requirements of such an office, than to express them with precision in a definition that shall be entirely faultless. It will be found, however, by consulting the cases and the authorities, that the most general distinction of a public office is, that it embraces the performance by the incumbent of a public function delegated to him as a part of the sovereignty of the state. Thus in Meachem's Offices and Officers, section 4, it is said: "The most important characteristic which distinguishes an office from an employment or contract, is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer." So in High on Extraordinary Legal Remedies, section 625, it is said: "An office, such as to properly come within the legitimate scope of an information in the nature of a *quo warranto*, may be defined as a public position, to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public." And in the case of *Darley v. The Queen*, 12 Cl. & Fin., 520, which is generally cited as a leading case, and where the question was whether the information would lie against the treasurer of the city of Dublin, Tindal, C. J., said: "After the consideration of all the cases and dicta on the subject, the result appears to be that this proceeding by information in the nature of a *quo warranto* will lie for usurping any office, whether created by charter alone, or by the crown with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others; for with respect to such an employment the court certainly will not interfere, and the information will not properly lie." The fact that a public employment is held at the will or pleasure of another, as a deputy or servant, who holds at the will of his principal, is held, by the judges of the Supreme Court in an opinion delivered to the legislature of the state of Maine, to distinguish a mere employment from a public office, for in such cases no part of the state's sovereignty is delegated to such employees. 8 Greenleaf, 481. The case of *State ex rel. v. Brennan*, 49 Ohio St. 33, is not at variance with these views. It is quite clear from what has been said that the "Stationery Store-keeper" under consideration in that case was a public officer. He was charged with the purchase and safe-keeping of the stationery required by the county. The judge, in delivering the opinion, did not undertake to give an exhaustive definition of a public office; but did say that "it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and con-

Public office -
being a public
function delegated
as part of
sov. of state.

Independent power
to control public
prop is a public
function

tinuance, with independent power to control the property of the public, or with functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office." Here, and throughout the opinion, prominence is given to the fact, that a public officer is one who exercises, in an independent capacity, a public function in the interest of the people, by virtue of law, which is only saying in another form, that he exercises a portion of the sovereignty of the people delegated to him by law.

Firemen are
not public
officers
They are
subject to
the direction
of the chief

Applying what has been said to the case before us, and it clearly appears, as we think, that the firemen, other than the chief, employed by the council under the ordinance of June 23, 1897, are not public officers. They have no control of the fire department, nor of any of its property for any purpose, other than to use it in the extinguishment of fires whenever the occasion requires. They are subject on all occasions and in whatever they do in the course of their employment, to the direction and control of the chief of the department. They receive for their services \$50.00 per month, and may be discharged at any time by the council. Hence they are simply persons in the employment of the fire department, and are not public officers of any kind.

We are, however, cited to some cases where it has been said, as a reason for the non-liability of a city for the acts of its fire department, that firemen are officers. On examination it will be found that this is not the true reason. It assumes that a city is in no case liable for the acts of its officers. But this is not true in all cases. A city is liable for the wrongful or negligent acts of its street commissioner. It is true that, in this instance, it is made the duty of a city to keep its streets in repair and free from nuisances, whilst, in this state, it is not required to establish a fire department. But if it organizes a fire department, and levies a tax for its support, it would then seem to become its duty to see that it is properly organized, and that its agents carefully perform their duties in the one case as well as in the other. For it is a general principle, that, though a person may not be bound to do a particular thing, yet if he voluntarily undertake to do it, he is bound to use reasonable care and diligence in its performance, and is liable in damages to one injured from his failure to do so. There is no statutory duty in cities to construct sewers; but if a city does, it becomes liable to a party injured by the negligence of its officers and agents in constructing and maintaining them. Dillon, *Municipal Corporations*, 4th ed., section 980. The levying of the tax and assuming to act in the premises imposes the duty. Hence the true reason for the exemption of a city from liability for the acts of its firemen is most probably not referable to the fact that they are officers but to the fact that it would be unwise to burthen the taxpayers of a city with damages resulting from the negligence of its agents in such cases; in other words, is simply a limitation suggested by the policy of the law on the maxim *respondet superior*, in its appli-

cation to cities in such cases. In none of these cases was any effort made to determine what, in general, constitutes a public officer. In Dillon on Municipal Corporations, 4th ed., section 976, it is said: "The exemption from liability in these and the like cases, is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; as the members of the fire department, although appointed and employed and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable." So that the simple fact that a city is not liable for the acts of its fire department does not prove that all of its members are necessarily public officers; and may, when not properly employed, be ousted from their employment by the state, as usurping on its authority in a proceeding in *quo warranto*. We are therefore led to the conclusion that none of the firemen proceeded against in this case can properly be termed public officers; they are clothed with none of the requisites of such an officer; are simply in the employment of the city as laborers, and the right to be so employed cannot be challenged by *quo warranto*. The fact that their employment requires skill and experience does not alter the case. Skill and experience do not constitute a public office; they are simply requirements of suitability for the place; and are no more attributes of a public office than of a private employment.

Writ refused and petition dismissed.

STATE v. ROSE. 59

1906. 74 Kan. 262.

JOHNSTON, C. J.¹ . . . Rose was originally elected mayor for the term of two years ending April 12, 1907; for official misconduct he was, in April, 1906, removed from the office by a judgment which in terms wholly ousted and excluded him from the office and adjudged that he do not intrude into it during the term for which he was originally elected. In open disregard of this judgment he is now in possession of the office, and is assuming to exercise its functions and powers. The judgment is not ambiguous, and, if it is valid, the defendant is unquestionably in contempt of the court which rendered it.

Some of his attacks on the judgment would have been entitled to more consideration if they had been made before it was finally rendered. This proceeding cannot be regarded as one to correct irregularities or errors. The judgment was rendered in a *quo warranto* proceeding wherein the court had unquestioned jurisdiction, and unless it is absolutely void it is not open to attack. It is first assailed on the

¹ The statement of the pleadings is omitted. — ED.

1) that said
- became other
remedies existed.

ground that the court was without power to oust the defendant in a *quo warranto* proceeding, because other and adequate remedies existed for getting rid of unfaithful mayors. If this kind of an objection were available after judgment, it would not aid the defendant. He calls attention to the statutes making official misconduct a crime, one of the penalties of which is the forfeiture of the office, and also to the case of *The State ex rel. v. Wilson*, 80 Kan. 661, 2 Pac. 828, which held that an officer could not be removed until he had been adjudged guilty of a criminal offense defined by a certain statute. That decision was based upon a statute which provided that forfeiture of office constituted a part of the penalty of the offense prescribed, and that it did not occur until a conviction was had. In that case the court recognized that the legislature had the power to provide for a forfeiture for misconduct, independent of any criminal prosecution, but held that it had not done so in the statute then under consideration. The statute under which the present action was brought authorizes not only criminal proceedings but expressly provides for the removal of the offending officer by a civil action. Gen. Stat. 1901, § 2462. This remedy, it will be observed, is not incidental to the criminal proceeding, but is an additional and independent one. *The State ex rel. v. Foster*, 32 Kan. 14, 3 Pac. 534. The violations of the law by the officer are not only public offenses, but in committing them he forfeits his right to the office, and this forfeiture may be judicially declared in a *quo warranto* proceeding.

2) if said from
- resignation
- a condition

The judgment cannot be deemed to be invalid because of the resignation of Rose just before its rendition. The issues were joined, testimony had been taken, and the case was ripe for trial before the resignation, and the defendant could not then, by surrendering the office, divest the court of jurisdiction nor thwart the purposes of the proceeding. The public had an interest in the action, and the judgment to be rendered was of no less consequence to it than to the individual interests of the defendant. The judgment of ouster, as Mr. High has said, "is not at all dependent upon whether the respondent does or does not claim a right to exercise the office or franchise in controversy; the question being whether he has done any act which necessarily implies a claim to its exercise. And if such act can be shown, judgment of ouster will be given, notwithstanding the usurpation has ceased before the trial. So when a statute gives the prevailing party in proceedings upon a *quo warranto* information the right to costs absolutely, the court will give judgment of ouster, notwithstanding the information is entirely fruitless, the term of office having long since expired." (High, Extra. Leg. Rem., 3d ed., § 754.) In *The State, etc., v. McDaniel et al.*, 22 Ohio St. 254, 368, the Supreme Court of Ohio held that resignation did not constitute a defense to an information in *quo warranto*, and that it was not within the power of the defendant in cases of this character to render the proceedings ineffectual by successive resignations. (See, also, *Attorney-general ex rel.*

Robinson v. Johnson, 68 N. H. 623, (7 Atl. 381); *Hunter v. Chandler*, 45 Mo. 452, 455; *The King v. Warlow*, 2 M. & S. [Eng. K. B.] 75.)

There remains the question, and in fact the only substantial question in the case, whether there was power in the court to render an effectual judgment ousting the defendant from the office for the remainder of the term to which he had been chosen. By the terms of the judgment he was not only ousted for the moment but for the entire term. While the judgment expressly deprives the defendant of any right for the balance of the term to the office forfeited for his misconduct, it is not certain that it is any more effective than would have been a general judgment of ouster. If the unlawful acts pleaded and proved operated to forfeit the office for the term to which Rose was elected, a judgment in general terms declaring a forfeiture would probably take from him all that he had forfeited. What was involved in the proceeding, and of what was the defendant deprived by the ouster? It was the office of mayor, with its rights and privileges. The office is a trust conferred by public authority, for a public purpose, and for a definite time. Mr. Justice Swayne said: "An office is a public station, or employment, conferred by the appointment of the government. The term embraces the ideas of *tenure*, *duration*, *emolument*, and *duties*." (*United States v. Hartwell*, 73 U. S. 385, 393, 18 L. Ed. 836) In the case of *In the Matter of Oaths to be taken by Attorneys and Counselors*, 20 Johns. (N. Y.) 491, an "office" was defined to be "an employment on behalf of the government, in any station or public trust, not merely *transient*, *occasional* or *incidental*." (Page 493.) In defining "public office" the Court of Appeals of New York said: "It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, . . . and to hold the place and perform the duty for the term and by the tenure prescribed by law." (*Matter of Hathaway*, 71 N. Y. 238, 244.)

The office of mayor, which was conferred on the defendant at the general city election of 1905, was not a transient or occasional trust. The office, with its rights and privileges, was given to him for a fixed time. It was a two-year trust: an entire thing. It has been said that, "in legal idea, an office is an entity, and may exist in fact, though it be without an incumbent." (*People v. Stratton*, 28 Cal. 382, 388.) The same court later said that in legal contemplation "each term of an office is an entity separate and distinct from all other terms of the same office." (*Thurston v. Clark*, 107 Cal. 285, 288, 40 Pac. 435). (See, also, *Wardlow v. Mayor, etc., City of New York*, 19 N. Y. Supp. 6, 7; *State of Iowa v. Welsh*, 109 Iowa, 19, 79 N. W. 369.)

The right to exercise the functions of the office of mayor and to enjoy its privileges for the two-year term was an entity conferred on the defendant, and it was that which was taken from him in the *quo warranto* proceeding. The resignation or the removal of an officer during his term and the election or appointment of a successor do not divide the term nor create a new and distinct one. In such a case the successor is filling

3) By terms of judgment
he was ousted for
entire term.

For the term
of mayor
of the city.

Term of office
was an entity
conferred on the
defendant.

Δ re-elected 226
by election.

STATE v. ROSE.

His subsequent
election for
appointment of
other wards
by special forfeited

out his predecessor's term; and when the defendant reentered the office and undertook to exercise its duties he was simply serving a portion of the very term which the court had decided that he was unfit to hold. Since under the law he forfeited and was ousted from the right to occupy the office for the remainder of the term, no subsequent election or appointment could restore to him that which he was adjudged to have forfeited and lost. The electors of the city are as much bound by the law and the judgment rendered in pursuance of the law as their representatives and officers, and the special election did not warrant the defendant in ignoring or violating the judgment rendered under the law.

In *State of Iowa v. Welsh*, 109 Iowa, 19, 79 N. W. 369, the supreme court of Iowa went so far as to hold that an officer might be removed during the term for which he had been reelected for official misconduct or neglect of duty during his previous term. After remarking that the object of the proceeding of removal from office is to rid the community of a corrupt, incapable or unworthy official, it was said:

"The commission of any of the prohibited acts the day before quite as particularly stamps him as an improper person to be entrusted with the performance of the duties of the particular office as though done the day after. The fact of guilt with respect to that office warrants the conclusion that he may no longer with safety be trusted in discharging his duties." (Page 23.)

It is not necessary to go to that extent in this case, but certainly the misconduct of which the defendant was found guilty stamps him as one not entitled to be entrusted with the duties of the particular office forfeited during the remainder of the term. The case of *State v. Jersey City*, 25 N. J. Law, 536, appears to hold a contrary view; but a case more nearly in point, and which is in accord with our judgment, is *State ex rel. v. Dart*, 57 Minn. 261, 59 N. W. 190. There a county treasurer was removed in a proper proceeding for the misappropriation of public funds. Afterward the board of county commissioners, which had authority to fill the vacancy, elected him to fill out the term. The question arose whether there was power in the board to reinvest him with the office in that manner. In deciding that there was not the Supreme Court of Minnesota said:

"The removal proceedings cannot be nullified or reversed in that manner. Such removal proceedings are not merely for the purpose of ousting the person holding the office; they include a charge that he has forfeited his qualification for the office for the remainder of the term. They are brought to declare a forfeiture of a civil right, his eligibility, his qualification to hold that office for the rest of that term. The proceeding is not brought for his removal from a day or a week or a month of his term, but from the whole of the remainder of his term. . . . Nothing less is involved in the proceedings. Whether the voters at the polls could condone the offense by which he forfeited his office it is not necessary here to decide. We are of the opinion that the county commissioners could not do so." (Page 263.)

At the argument the question was mooted whether a county attorney who had been removed from office could be reappointed during the term. The statute authorizing removal would serve little purpose if the district judge could appoint the unfaithful officer for the term forfeited and thus again invest him with the office and the opportunity to continue the violations of duty and of the law. Suppose a county clerk who was engaged in peculation with the connivance of the board of county commissioners was removed from office: the board, which has the power to fill the vacancy, might be willing to give the defaulter a new lease of power to continue his frauds against the public until the end of the term, but to allow it to be done would be trifling with justice. No such purpose can reasonably be imputed to the legislature.

Counsel for the defendant were inclined to concede that an officer removed for dereliction of duty could not be reappointed to fill the vacancy, but contended that a different rule obtains where provision is made for filling the vacancy by election. No room is seen for a distinction between an appointment and an election. The protection of the public is involved in the proceeding and judgment. Nothing in the statute suggests the electors, even, can condone the misfeasance, revive the forfeited right, or limit the effect or enforcement of a judgment of ouster.

It is said that this proceeding involves the title to an office, which can only be questioned in a direct proceeding, and that a contempt proceeding cannot be transformed into a *quo warranto* action. The determination of the title to the office is not directly drawn in question in this proceeding. The real inquiry is, Has the defendant violated the judgment rendered? That involves the scope and effect of the judgment and whether the defendant has intruded into the office and is doing that which the judgment forbids. The right to the office is only incidental to the main question: whether he is acting in disobedience and contempt of the judgment of the court. It is conceivable that a person removed from office might, for some purposes, be regarded as a *de facto* officer and yet be in contempt of a court which prohibited him from occupying the office. An ousted officer might again and again, in some illegal way, gain possession of the office and such recognition in it as would give validity to his acts, but it would hardly be contended that the only way by which the state could meet such contumacy and enforce the court's judgment would be to bring repeated *quo warranto* proceedings.

The contention that to deprive the defendant of the right to hold the office for the remainder of the term is to take away a right from him without due process of law is not well founded. He is only made to suffer the penalty imposed for misconduct in office and violation of law. The office is created by statute. The grounds for forfeiture are prescribed by statute, and the statute provides the method by which the forfeiture is declared. The defendant has no vested right to the office, and especially none which may not be forfeited and lost by misfeas-

ance. Having violated the statute, he must suffer the penalty which the statute prescribes. Having disobeyed and violated the judgment lawfully rendered and still in force, he is in contempt of this court, and is therefore adjudged to pay a fine of \$1000 and the costs of this proceeding; and, if the fine and costs be not paid within twenty days, he shall be committed to the jail of Shawnee county until they are paid.

All the Justices concurring.

BUCK v. EUREKA.

1895. 100 Cal. 504.

ACTION to recover compensation for legal services rendered to the city of Eureka. The defendant offered evidence to show that plaintiff had been elected and qualified and had acted as city attorney for the period during which the services were rendered. This evidence was rejected, and judgment given for plaintiff, and defendant appealed.¹

HENSHAW, J. . . . There can be no question upon this evidence, assuming for the moment the existence of the office, but that plaintiff was not only de facto city attorney, but that he was the regularly appointed, qualified, and acting city attorney, a de jure officer charged with all the duties and entitled to all the emoluments of the office. There can be no better proof of the acceptance and holding of an office than the qualification of the officer and his drawing of the salary. Here, the plaintiff was appointed as city attorney, filed his bond as city attorney, took the oath of office as city attorney, and drew the fixed salary of city attorney, all duly and regularly as required by law and the ordinances of the city.

Nor can plaintiff be heard to say (still assuming the existence of the office) that his contract with the city, or his understanding with the council, imposed upon him other or different or lesser duties than those which by law he was obliged to perform. He cannot, for example, be heard to say, as here he undertakes to do, in the face of the ordinance fixing his compensation, that his understanding with the council was that they were to give him twenty-five dollars a month as a "retainer," a "stipend," and were to pay him "extra for all important duties, particularly business in the superior court or business in the higher courts." It was not within the power of the plaintiff, or of the council, to modify by convention the duties which by law were made to pertain to the office of city attorney. Pol. Code, sec. 4391. And the plaintiff, after having qualified, filed his bond, and taken his oath to perform the duties of the office, and drawn the salary pertaining thereto, will not be permitted to assert that the duties he swore to

¹ This short statement of facts is substituted for that of the Court. — ED.

perform were not those the performance of which the law made obligatory upon him.

The contention that he was not city attorney cannot then be based upon any defect in the machinery of appointment, nor upon plaintiff's refusal with proper formalities to accept the appointment.

It is claimed to rest upon the fact that the council, notwithstanding its repeated recognition of the existence of the office, never in fact created it, and that, therefore, it never existed.

And the argument is that the council had power to create the office. Pol. Code, sec. 4408. That they were required, if they created it, to do so by ordinance. Pol. Code, sec. 4369. That the mode is the measure of their power, and that no ordinance was produced wherein and whereby the common council of the city of Eureka did ordain that the office of city attorney of the city of Eureka is hereby created.

It is a general rule founded upon the dictates of public policy that the acts of a *de facto* officer are valid, and that those who deal with such an officer are protected. The public is not required to know the terms and tenure upon which one openly holding and claiming the right to hold a public office maintains his position; nor is any person who has dealt with such an officer to suffer loss if the tenure should prove illegal. So, likewise, it is the general rule upon grounds of plain justice and public policy that a *de facto* officer is forever estopped in civil or criminal actions from denying that he holds the office, and from escaping any of the responsibilities which attach to his incumbency. But the further rule is that the law as to *de facto* officers applies only where there is a *de jure* office; the idea of a *de facto* officer being necessarily founded upon the conception of a *de jure* office. A *de jure* office is one having a legal existence, or, rather, one having an existence recognized by law.

While it is certainly impossible to conceive of an officer, either *de facto* or *de jure*, filling or attempting to fill a nonexistent office, there is a marked and well-recognized distinction between such nonexistent offices and those which, while having an irregular or merely potential, or in some instances even an illegal existence, yet do exist, and are recognized by the law.

Of offices having an illegal existence — which are nevertheless recognized — the government of a state in rebellion, and of a municipality acting as such without legal authority, are conspicuous examples.

The government of a state in rebellion and all offices thereunder are absolutely illegal, yet, upon strong and plain grounds of public policy the government and offices are recognized by law, and the incumbents are treated as *de facto* officers. "In such a case the acts of a *de facto* executive, a *de facto* judiciary, and of a *de facto* legislature must be recognized as valid. But this is required by political necessity." *Hildreth v. McIntire*, 1 J. J. Marsh. 207; 19 Am. Dec. 62.

So a municipal corporation, acting under color of the law, may have no legal existence, and, consequently, no legal municipal offices, yet

Continued from p. 228
never created office.

office not created
by ordinance
as to
recognition

But a *de facto*
office is
de facto

he holds office

public office
which is
office?

office may be
irregular
potential or
existence

such a corporation has still an existence recognized by law, and upon plain grounds of public policy the question of its legal existence should be raised only by the state itself upon *quo warranto*. Cooley's Constitutional Limitations, 254; *Town of Geneva v. Cole*, 61 Ill. 397; *St. Louis v. Shields*, 62 Mo. 247; *State v. Carr*, 5 N. H. 367.

ces created
unconst. laws
In some states indeed it is the established rule that officers filling offices created by unconstitutional laws are nevertheless *de facto* officers until under direct proceedings the act has been declared unconstitutional. Thus, in *Burt v. Winona, etc., R. R. Co.*, 31 Minn. 472, it was held that the municipal court of Mankato was a *de facto* court, and that there can be a *de facto* office under an unconstitutional act creating it until the act is declared void. In the case of *Trumbo v. People*, 75 Ill. 561, a school district had been illegally established; the supreme court of Illinois reviewing the case in a later opinion (*Leach v. People*, 122 Ill. 420) say: "So far as that alleged district was concerned there was no such legal district, and there was no *de jure* office of school director of that alleged district." Yet, upon a proceeding to collect a tax the tax was sustained, it being held that the school directors were officers *de facto*, and that in collateral proceedings the legality of the formation of the district could not be inquired into. And in *Commonwealth v. McCombs*, 56 Pa. St. 436, it is said: "An act of the assembly, even if it be unconstitutional, is sufficient to give color of authority to the person acting under it."

These decisions are in obvious conflict with the authority of the great leading cases of *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, and *Norton v. Shelby County*, 118 U. S. 425, in the latter of which FIELD, J., explains that, while there are many cases deciding that a person holding an office under an unconstitutional law is a *de facto* officer, in every one it will be found that there was a legal office and that the unconstitutional law went only to the mode or manner of filling it. And they are likewise in conflict with the rule in this state declared in *People v. Toal*, 85 Cal. 333. They are not here cited in commendation or approval, but as instructive examples of the lengths to which those courts have felt compelled to go in carrying out what they conceived to be the plain mandate of public policy.

When, however, we come to consider the doctrine as applied to offices having an irregular or potential existence (as distinguished from a nonexisting office, or one void in its creation), the cases are numerous and uniform in treating the incumbents of such offices as de facto officers.

In *Gibb v. Washington*, 1 McAll. 480, dealing with the question of the creation of the office of appraiser, the court say: "If such an office has been even colorably created, then any irregularity which does not render the creation of the office void cannot be availed of."

In *re Ah Lee*, 6 Saw. 410, the constitution of Oregon provided that when the population reached two hundred thousand the legislature should district the state into designated circuits, and provided for the

election of judges to the circuit courts therein. The legislature passed the act before the state attained the requisite population, and before election the governor, without authority, appointed the judge whose act was under review. The court held that admitting the act to be unconstitutional and the appointment of the governor to be invalid, still the judge was a judge *de facto*, since the office *in effect* was created by the constitution.

In *Carleton v. People*, 10 Mich. 250, the county officers were elected before the law creating the offices went into effect. They were held to be *de facto* officers. Though there were no legal offices in existence at the time, still the offices were *created*, and had a potential existence. And the court in distinguishing between such offices and non-existent offices aptly says: "Where the law negatives the idea that there can be a legal incumbent, any one assuming to act assumes what any one is bound to know is not a legal office."

In *Yorty v. Paine*, 62 Wis. 154, the legislative act creating the town of Pine River provided that the electors should meet upon the first Tuesday of the following April (April 4th), and elect town officers, but the act itself did not become a law until four days afterward — April 8th. The potential existence of the town was recognized as sufficient for holding the election, and the officers were declared to be *de facto*, though elected without authority of law to offices then having no more than a potential existence.

In *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62, the legislature had created a new county and the offices thereof. The governor appointed officers before the law went into effect. It was held that their acts were binding as *de facto* officers, though the appointments themselves were afterward declared void by the same court when the question was presented upon direct attack. *Commonwealth v. Fowler*, 10 Mass. 291. Here too, therefore, the potential existence of the office was recognized.

In *Leach v. People, supra*, an unconstitutional law regulating township organizations provided for the number of members, mode of election, etc., of the board of supervisors, and under this law a board was selected whose acts were under consideration. It was held that notwithstanding the invalidity of the law, there was still "such a legal official body known to the law as the board of supervisors of Wayne county," and the acting board, though in number and in mode of selection illegal, was upheld as a *de facto* body.

The case of *Smith v. Lynch*, 29 Ohio St. 261, is nearly a parallel case with the one at bar. The legislature of Ohio authorized villages and towns to establish boards of health and appoint members. The village of West Cleveland, by a void ordinance, attempted to do this. The members appointed qualified, and entered upon the discharge of their duties, and were accepted and regarded by the public as such members. The opinion of the court, delivered by Welch, C. J., is as follows: "The questions argued by counsel are: 1. Had the superior

court jurisdiction? 2. Are the requirements of the statute as to the manner of passing the ordinance mandatory, or are they merely directory? 3. If these requirements are mandatory, are the persons so acting to be regarded as a board of health *de facto*? We are satisfied that the last named of these questions must be answered in the affirmative. It is unnecessary, therefore, to consider the first and second questions. In other words, we think that, under the circumstances, the board is to be regarded as a board *de facto*. Whether it was a board *de jure* and whether the superior court had jurisdiction of the case became, therefore, immaterial questions. It is claimed by counsel for the plaintiff that this is not a case where an office has been filled and its duties performed by parties not legally appointed or qualified, but a case where *there was no office to be filled*. We do not so understand the law. The statute (60 Ohio Laws, 200) creates the office. It authorizes the council to 'establish' the board, and to fill it by appointment. True, until the council act in the premises it is a mere potentiality in their hands; yet it is none the less an office, known to the law. Where the council assume to establish the board under the law and to appoint its members, there is no good reason why an irregularity or illegality in the act of establishing the office any more than an irregularity or illegality in the appointment of the officers should be held as rendering the acts of the officers void, and themselves mere trespassers. The reasons—the considerations of public policy—which exist in one case, exist equally in the other. It is enough that the office is one provided for by law, and that the parties have the color of appointment, assumed to be and act as such officers, and that they are accepted and acknowledged by the public as such to the exclusion of all others. Such was the case here. There was both the color and the fact of office."

The office under consideration was given a potential existence by the acts of the legislature in the sections of the code above quoted. The plaintiff having accepted the appointment to it, and received the emoluments of it, is estopped from endeavoring to show to his own advantage that the council did not follow a prescribed mode in perfecting that potential existence. It was therefore error for the trial court to strike out the admitted evidence.

It does not seem to be disputed that if plaintiff's services in the case of *Wing Hing v. City of Eureka, supra*, were such as under his office he was in duty bound to perform, his contract with the council would be void as an attempt to increase his compensation. And indeed no question can arise upon this point. It is definitely settled by the language of the constitution in the first place (Const. art. XI, sec. 9), and in the second place, even in the absence of such a provision, such a contract would be declared void upon grounds of public policy. "It is a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these

duties, even though the salary be a very inadequate remuneration for the services. . . . Whenever he considers the compensation inadequate he is at liberty to resign. The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may be attached to an office to lay the foundation for extra compensation would introduce intolerable mischief. The rule, too, should be strictly enforced." Dillon on Municipal Corporations, 4th ed., sec. 233; Mechem on Public Officers, secs. 324-76.

The contention is, however, that these services were not among those whose performance is enjoined on the city attorney, and herein plaintiff relies upon the case of *Herrington v. Santa Clara County*, 44 Cal. 496.

As the law stood when that decision was rendered, the district attorney was entitled to receive as compensation ten per cent of all money recovered by him for the county in any action. The county supervisors, ignoring the district attorney, authorized other attorneys to bring suit without the county for the recovery of a large sum of money. Recovery was had in the action and the district attorney sued to recover his percentage. The law made it the duty of the district attorney to prosecute all actions for the recovery of debts, etc., and to defend all suits brought against his county. Pol. Code, sec. 4256. The district attorney was not denying that it was his duty to prosecute this suit; but to the contrary, insisted that it was his duty. The defendant county never claimed that it was not the district attorney's duty to prosecute the suit, but insisted that the duty was not exclusively imposed upon and the right not exclusively vested in him, but that the supervisors could, if they saw fit, engage other counsel to perform the service, as in many cases special counsel are employed.

The language of the court in its opinion, therefore, while not *obiter*, was not addressed to any contention raised by the parties. The decision of the court was by a bare majority, Chief Justice Wallace being disqualified, and Justice Rhodes expressing no opinion. It was based upon two grounds; the second, which is argued at length, holding that as the district attorney had not collected the money, he was not entitled to his commission; and the first, which is not argued, being a declaration to the effect that it was "not a duty enjoined upon the district attorney by law to prosecute or defend civil actions in which the county is intererested which are pending in any other county than his own." This declaration is, however, supported by no reasoning, by no analysis of the statute, and by no citation of authority.

And it would be difficult so to support it. Says Dillon: "The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and if these distinctions are much favored by

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courts of justice, it may lead to great abuse." Dillon on Municipal Corporations, 4th ed., sec. 233.

When the law of the state says that the district attorney shall prosecute and defend *all suits*, and the city attorney shall attend to "*all suits, matters, and things in which the city may be legally interested*," it is a most forced and unwarranted construction to hold that in the one case it means only such suits as are commenced and finally determined in the county courts, and in the other only such as are in like manner commenced and determined in the municipal courts. If the legislature meant that, it could and would have said so. But when it says "*all suits, matters, and things*," the language will bear no other construction than that which is patent on its face. No rules of interpretation are necessary to be considered, for no need or room for interpretation exists. Thus the court held in *Ryce v. City of Osage*, 88 Iowa, 558. The law made it the duty of the city attorney "to act as attorney for the city in any suit or action brought by or against the city, and generally to attend to the interests of the city as its attorney." There, as here, plaintiff claimed extra compensation for services rendered under contract with the council for defending an action against the city in the district and supreme court; and there, as here, urged that it was no part of his official duty to defend the suit. Says the court: "It seems to us that a mere reading of that section of the ordinance prescribing the duties of the city attorney is sufficient to show that under it he was required to act for the city in any case brought by or against it. . . . That the services rendered by plaintiff, and for which he seeks now to recover, were included within his duties as city attorney, is too plain to admit of argument."

In *Lancaster County v. Fulton*, 128 Pa. St. 48, construing a similar statute, say the court: "The services for which the contract in question undertakes to provide are clearly within the sphere of the duties of the solicitor of Lancaster county."

Russell v. Hallett, 23 Kan. 276, is not in conflict with the authorities upon this question. In that case the county attorney sued his county for compensation for services demanded of him *without* the duties of his office, as the court decided. He had been compelled to assist in a trial in a county other than his own. The law expressly limited his duty to attending before magistrates and judges in his county. Kansas Gen. Stats., sec. 137, p. 264.

But it is unnecessary to multiply quotations upon this plain proposition.

We think it must be apparent that the construction given to the statute in *Herrington v. Santa Clara County*, *supra*, cannot be supported, and should no longer be maintained; and we believe that the evil results to the public service which must arise under that construction justify and demand a declaration from this court that it be no longer considered as authority.

It is of the last importance that any and every public officer enter-

ing upon the discharge of his duties should know once and for all that, be the duties onerous or be they easy, the compensation for them must be that fixed by law, and that only. If they become too burdensome, the law does not forbid the officer's resignation; but it does emphatically say that he shall not, under any circumstances, by use of the power of his office, by contract express or implied, fair or unfair, or by aid even of legislative enactment, obtain increased compensation for their performance. "The successful effort to obtain office is not unfrequently followed by efforts to increase its emoluments, while the incessant changes which the progressive spirit of the times is introducing effects almost every year changes in the character and addition to the amount of duty in almost every official station; and to allow the changes and additions to lay the foundation of claims for extra services would soon introduce intolerable mischief." *Evans v. City of Trenton*, 24 N. J. L. 764.

The services here performed by the plaintiff being such as it was his duty to perform as the city attorney of the city of Eureka, the contract was an attempt to increase his compensation, and is in violation of the constitution, against public policy, and therefore void.

"A promise to pay them [officers] extra compensation is absolutely void under the statute of Ohio. Such promise could not be enforced at common law, being against sound policy and quasi extortion. English judges have declared that such are novel in courts of justice, and that actions founded on such promises are scandalous and shameful (2 Burr, 934); and in the court of errors of New York they meet with no more favor (*Hatch v. Mann*, 15 Wend. 46)." *Gilmore v. Lewis*, 12 Ohio, 281; *Vandercook v. Williams*, 106 Ind. 345; *City of Decatur v. Vermillion*, 77 Ill. 315; *Hunter v. Nolf*, 71 Pa. St. 282.

Nor can plaintiff recover under the contract, as by his second count he seeks to do, for such part of the services as was rendered after his term of office had expired. This is not the case of a city attorney carrying on litigation after his term of office had expired, with the knowledge and consent of the authorities, in which case an implied contract and promise to pay might arise after his tenure had terminated. Here plaintiff declares on, and seeks to recover under a contract against public policy, and wholly void. Such a contract will not support any action for recovery.

As is said by the court in *Lancaster County v. Fulton*, 128 Pa. St. 48: "There is no pretense that any new agreement was entered into, or the terms of the original in any manner changed, after the expiration of the term of office. Neither the subject of a new contract nor the modification of the original even appears to have been considered by the parties. The services of plaintiff below were no doubt efficient and valuable; but, as far as they were rendered during his term of office, his salary is all the compensation he can claim. As to services rendered after the expiration of his term of office, under and in pursuance of the original illegal and void contract, he cannot, under the pleadings and evidence in this case, recover."

A void contract cannot form the basis of a judicial proceeding. *Santa Clara, etc., Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211.

There are, however, considerations in plaintiff's case which appeal with force to a court. In the first place the services rendered, as found by judge and jury, were of great value to defendant. In the second place they were rendered under an early interpretation given to the statute which justified plaintiff in suing upon his contract.

In now declaring what we believe to be the only tenable construction of the law relative to the duties of the office, it has followed as a necessary consequence that the contract, void as against public policy, will not support a cause of action. Plaintiff, however, if the facts will warrant it, should recover, not upon the original or void contract, but upon an implied one, for services rendered after the expiration of his term of office.

The judgment and order are reversed, with directions to the trial court to permit plaintiff, if he shall be so advised, to amend his complaint, or file an amended complaint, seeking compensation upon *quantum meruit* for services rendered after the expiration of his term of office.¹

COUGHLIN v. McELROY.

1902. 74 Conn. 397.

TORRANCE, C. J. In the case of *Coughlin v. McElroy*, 72 Conn. 99, this court held, in effect, that the plaintiff in the present case had been elected as tax collector of the city of Bridgeport for the term beginning April 10th, 1899, and judgment in his favor to that effect was rendered in the Superior Court. Pending that contest, McElroy was in possession of the office and performed the duties thereof from April 10th, 1899, to August 8th of the same year. During this period, upon the facts found, it is clear that the plaintiff was the tax collector *de jure*, and the defendant McElroy was the tax collector *de facto*. While holding said office as *de facto* collector, McElroy received and still retains certain sums of money, which the plaintiff seeks to recover from the city, or from McElroy, as the fees and emoluments of said office belonging to him as collector *de jure*.

The record presents for consideration two main questions: 1. Is the *de jure* officer, upon the facts found, entitled to recover from the city the sums so received and retained by the *de facto* officer? 2. Is he entitled to recover them from the *de facto* officer?

Although questions of this kind have frequently been considered and passed upon elsewhere, they are, so far as we know, questions of first impression in this State; and as we have no statute upon the sub-

¹ On the position of an officer appointed under an unconstitutional statute, compare *Norton v. Shelby County*, 118 U. S. 425, and *Lang v. Bayonne*, 74 N. J. L. 455.

ject, they are to be decided by the rules and principles of the common law applicable thereto. The decision of the first question involves the decision of a subordinate one, namely, whether upon the facts found the city can be considered as having legally paid to McElroy the fees retained by him as collector *de facto*.

The plaintiff claims that under the city charter and ordinances it is the duty of the tax collector to pay over to the city the full amount collected, without deduction, and to present his claim for fees to the proper authorities; and that McElroy having failed to comply with the provisions of the charter and ordinances in this respect, the money retained by him for fees cannot be regarded as having been paid to him by the city. Assuming, without deciding, that the plaintiff is right in his construction of the charter and ordinances of the city in regard to this matter, still we think that upon the facts found, and for the purposes of this case, the city must be regarded as having paid to McElroy the sums by him retained.

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sums retained
him (for collection)

The sums retained from time to time were the precise sums fixed by law as the fees of the collector, and for aught that appears of record they were due at the very time they were so retained, upon collections then turned over to the city; they were retained with the full consent and allowance of the city, upon the understanding between it and McElroy that they were payments; and they were so retained and allowed in the utmost good faith on the part of both, and in the full belief, on what then appeared to be reasonable grounds, that the payee was *de jure*, as he was *de facto*, the incumbent of said office. Payments of this kind to *de jure* collectors had been made in this way by the city for twenty years, and with full knowledge of the facts no one had questioned their validity. Fees retained by *de jure* tax collectors, under circumstances quite similar to those in the case at bar, have by our courts, in favor of sureties and taxing communities, been treated and regarded as payments; and we see no good reason in the present case why the fees retained by a *de facto* officer should not be regarded, in favor of the city, as having been paid to him by it. We think the evidence objected to was admissible to show such a payment, and that it was made in good faith; and that the city, as against the plaintiff, must be regarded as having paid to the *de facto* collector, in good faith and before he was ousted, the sums retained by him.

This being so, the question is whether the city having in good faith paid to the *de facto* officer, before judgment of ouster, the fees of the office, is liable to the *de jure* officer for such fees.

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Upon this question the decisions of the courts of this country are in direct conflict. Quite a number of courts of high authority, among which may be mentioned those of California, Maine, Tennessee, Wyoming, and Pennsylvania, hold that such a payment does not protect the community against the claims of the *de jure* officer. *Dorsey v. Smyth*, 28 Cal. 21; *Andrews v. Portland*, 79 Me. 484; *Memphis v. Woodward*, 12 Heisk. (Tenn.) 499; *Rasmussen v. Carbon County*, 8

Wyo. 277, 45 L. R. A. 295; *Philadelphia v. Rink*, 2 Atl. Rep. (Pa.) 505. On the other hand, the courts of a majority of the States that have had occasion to pass upon this question hold that such a payment does protect the community. Among the courts holding this doctrine may be mentioned those of the States of Michigan, New York, Missouri, Ohio, Kansas, Nebraska, and New Hampshire. *Wayne County v. Benoit*, 20 Mich. 176; *Dolan v. Mayor*, 68 N. Y. 274; *McVeany v. Mayor*, 80 id. 185; *State v. Clark*, 52 Mo. 508; *Westberg v. Kansas*, 64 id. 493; *Steubenville v. Culp*, 38 Ohio St. 18, 23; *Commissioners of Saline County v. Anderson*, 20 Kan. 298; *State v. Milne*, 36 Neb. 301, 19 L. R. A. 689; *Shannon v. Portsmouth*, 54 N. H. 183.

It seems to us that the rule laid down in this last class of cases is in reason the better one. It rests upon the familiar and reasonable rule that persons having the right to do business with a *de facto* officer like the one in question, have the right to regard him as a valid officer, and the right to make payments to him without the risk of having to pay a second time. This is the rule that protected the tax-payers in making payments to McElroy, and there appears to be no good reason why it should not be applied to payments made by the city to him in good faith and before judgment of ouster. Our conclusion is that the city is not liable to the plaintiff for the fees paid by it to the *de facto* collector.

With regard to the plaintiff's fees due for collections made by him since he took possession of the office, he is of course entitled to them. It is admitted by the pleadings that he duly presented his claim and demanded payment from the city. It is true that the claim so presented was for the fees for the entire year; but the greater includes the less, and we think his claim and demand included the fees earned by and due to him since he took possession.

The next question is whether the plaintiff is entitled to recover from the *de facto* officer the fees paid to such officer by the city; and the answer to this depends upon the answer to the further question, whether this can be done at common law and without the aid of a statute.

The courts of this country that have had occasion to pass upon this last question have almost unanimously answered it in the affirmative. That, in cases like the present, the legal right to the office carries with it the right to the salary and emoluments thereof, that the salary follows the office, and that the *de facto* officer though he performs the duties of the office has no legal right to the emoluments thereof, are propositions so generally held by the courts as to make the citation of authorities in support of them almost superfluous. Nearly all, if not all, cases hereinbefore cited upon both views as to the liability of the city, hold that the *de facto* officer, for fees and emoluments of the office received by him, is liable at common law to the officer *de jure*. So far as we are aware the only well-considered case taking a contrary

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view of the law is that of *Stuhr v. Curran*, 44 N. J. L. 181, 186, and that was decided by a divided court standing seven to five. We think the able dissenting opinion of Chief Justice Beasley in that case shows conclusively that at common law, in a case like the present, the *de jure* officer is entitled to recover from the *de facto* officer. Another well-considered case directly in point in favor of this view is that of *Kreitz v. Behrensmeyer*, 149 Ill. 496, 24 L. R. A. 59. As before intimated, this court has not heretofore had occasion to decide a question similar to the one now under consideration, but in two cases at least the judges who wrote the opinion of the court have expressed views in harmony with what we hold to be the law. Thus, CHIEF JUSTICE SEYMOUR, in *Samis v. King*, 40 Conn. 298, 310, said: "The right to the salary of an office (as such, independent of actual and valuable services rendered) must on principle depend upon the legal possession of the office." It is a grave question whether a merely *de facto* officer, even when he actually performs the whole duties of the office, can enforce the payment of the salary. The authorities seem to be that he cannot. CHIEF JUSTICE BUTLER, in *State v. Carroll*, 38 Conn. 449, 471, says that a *de facto* officer "cannot collect his fees, or claim any rights incident to his office, without showing himself to be an officer *de jure*."

That this law will at times operate harshly against the *de facto* officer, and that it will so operate in the case at bar, must be conceded; and the seeming injustice of it is forcibly stated in the majority opinion of the New Jersey court before cited; but the courts must enforce the law as it is and not the law as they think it ought to be. If the law requires to be changed that must be left to the legislature.

Our conclusion is that upon the facts found in this case the plaintiff is entitled to recover from McElroy the fees retained by the latter as an officer *de facto*.

The Superior Court is advised (1) to render judgment in favor of the plaintiff against the city of Bridgeport for the sum of \$887.50 with interest from the date of demand, (2) to render judgment in favor of the plaintiff against McElroy for the sum of \$4,775.02 with interest from the date of demand.

Costs in this court will be taxed in favor of the plaintiff.

In this opinion the other judges concurred.

CHAPTER IV.

POWERS OF A MUNICIPAL CORPORATION.

SECTION I. — *General Principles.*

SPAULDING v. LOWELL. 62

1839. 23 Pick. 71.

SHAW, C. J.¹ The question, and the only one of considerable importance, in the present case, is, whether the plaintiff was liable for the tax which he was compelled to pay, and the amount of which he seeks to recover back in the present action. The objection is, that it embraced an assessment to raise money for a market-house which the town of Lowell, before its incorporation as a city, had voted to build. No question in this case arises upon the relative rights and powers of towns and cities, or upon the change from one form of municipal government to another, during the pendency of these proceedings. Lowell was established as a city in April, 1836. By the terms of the charter, they were made or rather continued a corporation for all purposes for which towns are incorporated, and they were thereby declared to be entitled to all the rights, immunities, powers and privileges, and subject to all the duties and obligations before incumbent upon and appertaining to said town. The question therefore resolves itself into the general one, whether cities and towns in this Commonwealth, by virtue of their general powers, and without any special authority conferred on them respectively for that purpose, have authority in their corporate capacity to build a market-house, to appropriate money therefor, and assess the same, in common with other town charges, upon the inhabitants.

The principle is now well settled, that corporations, being creatures by which several persons are associated together to act in concert for special purposes, can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of

¹ Statement of facts and arguments omitted.—Ed.

their association. This principle is fairly derived from the nature of corporations, and the mode in which they are organized, and in which their affairs must be conducted. In aggregate corporations, as a general rule, the act and will of a majority is deemed in law the act and will of the whole, and therefore is to be carried into effect as the act of the corporate body. The consequence is, that a minority must be bound, not only without, but against their consent. Such obligation may extend to every onerous duty, to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, that corporations can only exercise their powers over their respective members, for the accomplishment of limited and well defined objects. And if this principle is important as a general rule of social right and of municipal law, it is of the highest importance in these States, where corporations have been extended and multiplied, so as to embrace almost every object of human concern. The general principle itself is fully recognized in several cases in this Commonwealth. *Bangs v. Snow*, 1 Mass. R. 181; *Stetson v. Kempton*, 13 Mass. R. 272; *Willard v. Newburyport*, 12 Pick. 227.

But although the rule as thus stated, and thus important and salutary, is clear and unquestionable, much difficulty arises in the application of it to such a class of corporations as cities and towns, on account of the indefinite and miscellaneous purposes for which they are constituted. This difficulty is stated and illustrated in the case last above cited. *Willard v. Newburyport*, 12 Pick. 227.

The general authority of towns to raise money by assessment of taxes on the inhabitants, was given by St. 1785, c. 75, § 7, "for the settlement, maintenance and support of the ministry, schools, the poor, and other necessary charges arising within the same town."

The authority is not much more definitely expressed in the Revised Statutes. Revised Stat. c. 15, § 12.

"Towns shall have power to grant and vote such sums of money as they shall judge necessary, for the following purposes,

For the support of town schools:

For the support and maintenance of the poor:

For burial grounds; and

For all other necessary charges arising within the same town."

By a comparison of the two provisions it will appear that one object of town charges is introduced into the Revised Statutes that was not expressed in the old one, that of burial grounds. This subject was one of those miscellaneous cases, mentioned in the case last cited, over which towns exercised an authority in fact though none was given by statute. It is since conferred by this provision of the Revised Statutes.

Gen. auth. to
tax.

"For all other necessary charges arising within the same town."

But the same remark may be applied to this, as to the old statute, that it is manifestly not intended as an enumeration of all the particular objects, because some of the most obvious subjects of town charge are omitted, such as highways and bridges, pounds, magazines and many others. This is also manifest from the sweeping clause "other necessary charges," which clearly implies that many things, not enumerated, are intended to be included. But the Court are not at all prepared to say, that under this term, "other necessary charges," coupled with the previous clause, "such sums as they shall judge necessary," it was intended to authorize towns to raise and appropriate money for general objects, or that it was intended to constitute a new, substantive power of taxation. It would be letting in all the mischiefs arising from an indefinite and arbitrary power of a majority to bind a minority to an unlimited extent. *Beatty v. Lessee of Knowler*, 4 Peters, 152. On the contrary, we think it referred to other provisions of law, and well established usage, to ascertain what the objects of town charge are, and to provide that towns might raise money for any purposes thus determined. But to bring any particular subject within this description of necessary town charges, it must appear to be money necessary to the execution of some corporate power, the enjoyment of some corporate right, or the performance of some corporate duty, as established by law or by long usage. For instance, towns are authorized and required to hold meetings; as incidental thereunto they may hire, purchase or build a town-house. They may prosecute and defend suits; as incident to which, they may appropriate money to retain counsel, to pay costs, and to meet and satisfy judgments which may be recovered against them. In this very case, should the plaintiff recover, the defendants must have authority, in their corporate capacity, to raise money to satisfy the judgment, of which the plaintiff, if he continues an inhabitant, will be liable by way of assessment to pay his part.

The earlier statutes of the province and colony concur with those under the present constitution, in vesting towns with the power to agree upon and make rules, orders and by-laws for managing and ordering the prudential affairs of the town. St. 1785, c. 75, § 7; Revised Stat. c. 15, § 13. The ambiguity lies in the indefinite term "prudential affairs," and the difficulty arises in each case, in settling what concerns fall within it. One thing is very clear, that it cannot include those objects of social concern which are expressly vested in other bodies, as was settled in the case of *Stetson v. Kempton*. In that case it was held, that the defense of the country against a foreign enemy, being placed under the jurisdiction of the general and state governments, could not be deemed an object for which towns can raise and appropriate money.

In the case of *Willard v. Newburyport*, above cited, some attempt was made to describe what is understood to be "prudential concerns," by stating that it embraces those subjects affecting the accommodation

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 "other"
 does not
 power of taxation

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 (1)

and convenience of the inhabitants, not otherwise specifically provided for, which have been placed under the jurisdiction of towns by statute or by usage. It may be suggested that referring to usage as a source of this power, is still leaving subjects open to doubt. It does so; but as there are some subjects which have long been regarded as within the authority of towns, not made so by statute, and as such powers have never been questioned, there is no authority whence they can be derived but usage. Indeed a recurrence to the history of the formation of towns, will show that most of the powers originated in usage, founded on the convenience and necessities of the inhabitants, and were afterwards recognized and confirmed by statute. Townships were originally local divisions of the territory, made with a view to a settlement and disposition of the property in the soil. But the inhabitants of each acted together on many subjects of common interest to themselves, and those especially, in the first instance, which affected the partition and appropriation of the land amongst the proprietors, who were strictly tenants in common. But from convenience and necessity they adopted many other regulations affecting their mutual interests as settlers and inhabitants. After these regulations had continued for some years, they were recognized and confirmed by statute. The first act which seems to have been passed was in 1670, forty years after the first settlement. And the provincial act of 1692 contains a preamble reciting, that whereas it has been a *continued practice and custom* in the several towns within this province, annually to choose selectmen or townsmen, for the ordering and managing of the prudential affairs, &c., and then goes on to provide for the choice of selectmen, overseers, constables, surveyors of highways, tithingmen, fence-viewers, clerks of the market, sealers of leather, and other ordinary town officers. The same statute gives to towns the authority to make orders and by-laws "for managing and ordering their prudential affairs of such town, as they shall judge most conducing to the peace, welfare and good order thereof." From this and various other legal provisions, we think it will be found that towns were not originally incorporated with specific and enumerated powers; but that the inhabitants and settlers of each township, as organized bodies, adopted regulations for their common convenience, and when they were incorporated, or rather recognized by general laws as established corporations, the powers which they had thus been used and accustomed to exercise were referred to, and confirmed, under the very broad and comprehensive term, "prudential concerns." So in the officers to be elected, after enumerating many specifically, the statute of 1692 adds, "other ordinary town officers." Care seems to be taken lest in a specific enumeration, some might be omitted who, according to custom, ought to be chosen. And the same solicitude is manifested through all the succeeding enactments, down to the Revised Statutes, which, after enumerating many officers to be elected, closes with the addition of "all other usual town officers."

Eliza J. 2.
111

In looking to usage and custom as the means of ascertaining what subject of common interest is embraced under the term "prudentials," the Court are of opinion that the erecting of a market-place, in the large towns and populous villages, is embraced. The circumstance that special acts of legislation have been occasionally passed respecting the building of market-houses, can have no considerable influence. Even if they embraced a power, in terms, to erect a market-house, it might be accounted for, by considering it as done *ex majori cautela*; but in general it will be found, that these acts embraced other and additional powers, which could not be used under the general authority to erect a market-house, such as the taking of land for the public use, as in the case of the extension of Faneuil Hall Market, or the like. St. 1823, c. 147. In the case of *Stetson v. Kempton*, which seems to have been well considered, and has ever since been regarded as a leading case, in considering what limitation is to be put on the power to raise money for "other necessary charges," it is said, "the erection of public buildings for the accommodation of the inhabitants, such as town-houses to assemble in, and market-houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term *necessary*." And though it was not the question directly before the Court, yet being put by way of instance as itself unquestionable, to illustrate the general proposition, and to distinguish what were and what were not objects of town charge, it is very strong evidence of the usage. The early statutes on the subject of holding markets, and establishing market days, can have but little bearing on the present question. They related to holding open markets, at particular times and places, which was regarded as a franchise at common law. We think the present question stands upon another and different footing, that of long established and well settled usage. And in considering this subject of usage, it is proper to add, that it is not a casual or occasional exercise of a power, by one or a few towns, which will constitute such a usage; but it must be a usage reasonable in itself, general amongst all towns of like situation as to settlement and population, and of long continuance.

On the whole, the Court are of opinion that the town and city of Lowell had authority to raise and appropriate money for building a market-house, and to assess the same upon the inhabitants.

It was further contended, in the present case, that even if the town had authority to assess money for building a market-house, yet that it would not justify the present tax, because a part of the building was appropriated to other objects. If this had been a colorable act, under the pretence of exercising a legal power, looking to other and distinct objects beyond the scope of the principal one, it might be treated as the abuse of power, and a nullity. But we perceive no evidence to justify such a conclusion, in the present case. The building of a market-house was the principal and leading object, and everything else seems to have been incidental and subordinate. We cannot therefore

say that it was such an excess of authority as to invalidate the acts, which they might rightfully do. As to the size and other circumstances of the building, if the accomplishment of the object was within the scope of the corporate powers of the town, the corporation itself was the proper judge of the fitness of the building for its objects, and it is not competent in this suit to inquire whether it was a larger and more expensive building than the exigencies of the city required.

Plaintiff nonsuit.

*It won't do
while the city
can't pay for it.*

HOOD v. LYNN.

63

1861. 1 Allen (Mass.), 103.

PETITION under St. 1847, c. 87, filed June 30, 1857, by eleven voters and tax-payers of Lynn, for an injunction to restrain the respondents from paying money from the city treasury under the following vote passed on the 29th of June by the board of aldermen and common council of that city:

*Inj. to restrain
expenditure for
Fireworks*

"Ordered, that his honor the mayor and aldermen Holmes and Stacey, with such as the council see fit to join, be a joint special committee whose duty it shall be to procure a display of fireworks on the night of the Fourth of July next; and that the sum of five hundred dollars, to be taken from the contingent fund, be and the same is hereby appropriated for the purpose of defraying the expenses thereof."

The citation was served on the respondents on the 1st of July, 1857; and it was agreed that afterwards the sum of \$312.50 was paid for expenses incurred under said vote, by the city treasurer on the warrant of the mayor, and that the sum of \$187.50 remains due therefor.

W. G. Choate, for the petitioners.

D. Peabody, for the respondents.

BIGELOW, C. J. The nature and extent of the power of towns and cities to appropriate money and incur expenses to be paid out of the funds raised by taxation have often passed under the judication of this court. It is therefore unnecessary to discuss the subject at length in the present case. The general principle is well settled that municipal corporations, like other corporations aggregate, can exercise no powers other than those which are conferred on them by the act by which they are created, or such as are necessarily incident to the exercise of their corporate rights, the performance of their corporate duties, and the accomplishment of the purposes for which they are constituted. The observance of this rule, and the steady and firm enforcement of it by courts of justice, are of the highest importance. In no other way can the majority be prevented from an oppressive and reckless use of power, or the minority protected against liability

for an illegal and unauthorized expenditure of the public money. It was with a view to furnish a prompt and effective remedy to restrain cities and towns from raising, borrowing, or expending money for purposes not authorized by law, and to enable a minority to guard their rights and interests, when such unlawful acts were threatened or in contemplation, that the statute of 1847, c. 37, (re-enacted in Gen. Sts. c. 18 § 79,) was passed; by which this court has power to interfere summarily on the petition of ten taxable inhabitants, and restrain by injunction, according to the practice of courts of equity, any violation or abuse by a town or city of its legal right and power to pledge its credit or to raise and expend money. It is under this statute that the petitioners in the present case ask for the interference of the court.

It is not pretended by the respondents that the purpose for which they appropriated the money of the city, by the vote set out in the bill, comes within any of the objects enumerated in the statutes for which towns and cities have power to grant and vote money. It is suggested, however, that it may come within the general clause by which they are authorized to raise money for "all other necessary charges." But this language has already received a judicial interpretation, and, under the broadest and most liberal construction which has ever been put upon it, we cannot see how it can be made to embrace an expenditure like that contemplated in the vote passed by the respondents. The appropriation is neither necessary to the exercise of any power expressly granted to the city; nor is it incidental to any right or authority, which, though not expressly granted, has its origin in well settled usage, and is founded upon the necessities, convenience, or even the comfort of the inhabitants. This is the extreme limit of the power of towns and cities to grant money, as settled by repeated adjudications of this court. *Stetson v. Kempton*, 13 Mass. 272; *Parsons v. Goshen*, 11 Pick. 396; *Willard v. Newburyport*, 12 Pick. 227; *Allen v. Taunton*, 19 Pick. 485; *Spaulding v. Lowell*, 23 Pick. 71; *Anthony v. Adams*, 1 Met. 284. Viewed in the most favorable light for the respondents, their vote authorized an expenditure of public money to celebrate the anniversary of a great event of national and historical interest, in a manner which might serve to amuse the inhabitants, and perhaps excite in their minds a spirit of patriotism and a love of liberty. But these objects, however laudable, do not come within the range of municipal powers and duties. If money in the treasury of a city can be expended to commemorate one event of interest and importance in the history of the country, so it may be to celebrate the anniversary of any and every other. But this court has already decided that a town cannot lawfully appropriate money to commemorate the surrender of Cornwallis, the last great act in the series of events which marked the Revolution and consummated the independence of the country. *Tash v. Adams*, 10 Cush. 252.

Nor would there be any limit to the amount of money which might

not a town
"other nec. charges"

Not supported by
usage

be expended for such purpose, nor to the mode in which the expenditure might be made, except that which might be prescribed by the will or caprice of the majority. If fireworks and illuminations can be permitted, so may dinners, balls and fêtes of every description. It is obvious that such a power would open a door for great abuses, and expenditures of the most wasteful character.

It was urged by the counsel for the respondents that the appropriation in the present case might be justified and sustained on the ground of usage. But the answer to the argument is twofold. In the first place, there is no evidence in the case of the existence of any such usage or custom in the towns or cities of this commonwealth. It is not even alleged in the answer of the respondents. Certainly the court cannot take judicial cognizance of it. But even if such usage was alleged and proved, it would not alter the case. An unlawful expenditure of the money of a town cannot be rendered valid by usage, however long continued. Abuses of power and violations of right derive no sanction from time or custom. A casual or occasional exercise of a power by one or a few towns will not constitute a usage. It must not only be general, reasonable and of long continuance, but, what is more important, it must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right, or which contributes essentially to the necessities and convenience of the inhabitants. The usage relied on in the present case, if established, would not satisfy either of these last named requisites, which are necessary to give it validity. It was said by this court, in a recent case, that there are many things in the management of town affairs, which are done without objection and pass by general consent, which cannot, when objection is made and they are brought to the test of judicial investigation, be supported as strictly legal. *Sikes v. Hatfield*, 18 Gray, 353. The present case is an illustration of the truth of this remark.

The petitioners were guilty of no laches in commencing these proceedings. They made their application to the court seasonably, and the respondents had ample notice that their proceedings were called in question, and that the validity of their vote was to be brought to the test of judicial inquiry. The respondents therefore went on at their peril; and if they have expended the money of the city for an unlawful purpose, they must take the consequences of their own wrongful act.

Injunction made perpetual.

Usage

Unlawful expenditure not valid by usage

file

PHELPS v. HAWLEY. 64

1873. 52 N. Y. 23.

PECKHAM, J.¹ The only question involved in this case is, upon whom rests the obligation of maintaining the bridge in Livingston county, between the towns of Geneseo and Leicester, over the Genesee river.

The plaintiff repaired the bridge upon the employment of the former commissioners of highways of those towns, at an expense of \$6,000, and sues their successors therefor.

Defendants insist that the bridge is a county charge.

Whether it is so or not depends upon the construction to be given to the language of the act incorporating the "Leicester Bridge Company" to construct a bridge at this point in 1837.

In the ninth section of that act it was provided that if the bridge shall not be completed within three years, or if, when completed, it should be impassable for fifteen days for want of repairs, unless carried away by unavoidable accident, or if the same shall not be rebuilt within eighteen months, then "the bridge shall become a public bridge, and may be maintained at the expense of the county of Livingston."

Laws of 1837, § 9.

Was this permissive or mandatory to the county?

There are reasons why it should be mandatory.

It appears that the stream to be crossed is a river, and the expense of the construction and repair of a bridge would be very onerous to the two opposite towns; more so then, probably, than now.

The corporation, chartered in 1837, that first constructed the bridge, with the right to take toll for thirty years if kept in repair, etc., abandoned the bridge when it was swept off some fifteen years after the charter. It could not be made profitable.

The county of Livingston then rebuilt it.

The course of legislation as to bridges over that river shows the legislative sense, that they should be substantially a county charge; three or four having been built by the county under statute authority.

Again, if this act be merely permissive to the county it confers little if any substantial additional power. The county then had authority to build it or to aid any town or towns in its construction, in a limited way, in its discretion. 1 R. S. 524, § 119, citing the statute 2 R. L. 281, § 33.

Again, the towns, on opposite sides of a stream, at that time had no regulation by statute, no organization to be put in motion to accom-

¹ Statement of facts and arguments omitted.—Ed.

plish the construction of a bridge. The first act passed upon that subject was in 1841. Laws of 1841, p. 207.

Under that act bridges could be built though towns were reluctant to do their duty. See *Hill v. Board of Supervisors of Livingston County*, 12 N. Y. 52.

There would thus seem to have been a propriety in 1837 that the county should have maintained this bridge.

But the act contains apt and legal language to require the county to do it. It says it shall "become a public bridge, and may be maintained" by the county.

This is a direction to a public body (not an option to a private person or corporation), in the execution whereof the inhabitants of that county have a pecuniary interest. In fact, the public generally may be said to have such an interest. Where persons or the public have an interest in having the act done by a public body, "may," in such a statute, means "must." *Newburgh Turn. Co. v. Miller*, 5 J. C. 113; *Malcolm v. Rogers*, 5 Cow. 188.

This rule must prevail where there is nothing that would evince a contrary intention in the statute or in the surrounding facts.

This disposes of the question.

It is conceded, as it well may be, that if the county by this act was required to maintain this bridge, no act of the commissioners could bind the town, as they then had no authority over the bridge. Its maintenance was specially provided for. Whether the commissioners can involve the towns in debt without limit for bridges it is not necessary to decide.

The judgment should be affirmed.

All concur.

Judgment affirmed.

AURORA WATER CO. v. AURORA.

1895. 129 Mo. 540.

SHERWOOD, J.¹ Action by plaintiff to recover of defendant city, a city of the fourth class, hydrant rentals amounting in the aggregate to \$3,809.90. Plaintiff's claim is that this amount was earned in consequence and by the performance of a contract made between plaintiff and defendant consisting of certain ordinances passed by defendant, adopted by a nearly unanimous vote of the tax-payers and accepted by plaintiff or its assignor.

Defendant denied the validity of the contract on constitutional and other grounds, and plaintiff replied. Copies of the ordinances involved will accompany this opinion.

¹ Statement of facts, argument, and all the opinion not relating to the power to call a special meeting omitted. — ED.

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Defendant paid the first installment of rentals for July, 1892, but after the ruling announced in the *Columbia* case, refused to make any more payments. Inasmuch as the constitutional questions put in issue by the pleadings herein have been in the second opinion delivered in *Lamar Water, etc., Co. v. City of Lamar*, 128 Mo. 188, determined against defendant's contention by court *in banc*, it will not be necessary to discuss them; we proceed, therefore, to the consideration of such questions which the record contains as are open to review.

I. a. And first as to the passage on February 23, 1891, of ordinance 35, which ordinance constitutes the ground work of plaintiff's demand. Various objections are urged against the validity of this ordinance. It is insisted that it is invalid because passed at an unauthorized meeting of the board, in that it was not a regular meeting, and that the statutes, while giving to cities of the first, second, and possibly the third, class power to call special meetings, yet that no such power is conferred by statute on cities of the fourth class. It may be granted that no such power is expressly conferred, yet it does not thence follow that such power is nonexistent. Of necessity, cities possess many powers which are not enumerated in the grant of power, and yet pass as the mere incidents and auxiliaries of those expressly granted.

Cities of the fourth class, to which defendant city belongs, have conferred upon them a great variety of powers by section 1589, Revised Statutes, 1889, among them the power "... to pass such other ordinances for the regulation and police of said city, and commons thereto appertaining, as they shall deem necessary; and to pass such ordinances, not inconsistent with this article, as may be expedient in maintaining the peace and good government, health and welfare of the city, its trade, commerce and manufactories."

As instances of such implied powers are those when a power to pass ordinances gives to the corporation, without any express grant of power, the incidental right to enforce them by reasonable pecuniary penalties. In England, as it is regarded as the duty and purpose of corporations to preserve the health and safety of the inhabitants of cities, it has always been held that reasonable regulations in regard to such objects fell within the incidental authority of corporations to ordain.

Under power conferred to pass ordinances to promote the general welfare and preserve the peace, a city may fix by ordinance the time or places of holding public markets, and make such other regulations concerning them as may conduce to the public interest.

Under a general welfare clause in relation to the maintenance of the good order of the city, it has been ruled that a city may "establish all suitable ordinances for administering the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits, and for the performance of the general duties required by law of municipal corporations."

Under a general power to pass "any other by-laws for the well-

ord. passed at

not granted

General welfare

taxes

being of the city," such corporation may pass an ordinance prohibiting saloons, etc., to be kept open after *10 o'clock at night*. 1 Dillon, Municipal Corporations [4 ed.], secs. 338, 369, 384, 393, 396, 400, and cases cited.

These authorities proceed on the evident theory of the familiar maxim that a grant of power takes with it all the necessary incidents to make that grant effectual. *State ex rel. v. Walbridge*, 119 Mo. 383, 24 S. W. Rep. *loc. cit.* 460, and cases cited.

And, as before stated, there are many implied powers which attach themselves to municipal corporations, inherent powers, which belong to them because they are municipal corporations. Just as certain powers are inherent in courts because of the very nature and attributes of their organization. Thus, at common law, it is an established principle in England, that a municipal corporation may, by virtue of its inherent or incidental power, pass a by-law imposing a pecuniary penalty upon such as refuse without legal excuse *an office* to which they have been duly elected. And the eminent jurist and author heretofore cited indicates that even in this country, under the usual general welfare clause or under their *incidental powers*, municipal corporations could, by ordinance, impose a reasonable fine because of a similar refusal. 1 Dillon, Municipal Corporations [4 ed.], section 223.

So, also, it is one of the common law incidents of all corporations to remove a corporate officer from his office for reasonable and just cause. *Ibid*, section 240. This principle was recognized and declared in *State ex rel. v. Walbridge*, *supra*; see, also, *City v. Schoenbusch*, 95 Mo. 618. These authorities have been instanced in reply to the suggestion of counsel for defendant that "a city can only do those things that its charter or the general statutes *expressly* authorize it to do." And surely no power could possess a stronger sanction of necessary implication, or could be more conducive toward "maintaining the peace and good government, health and welfare of the city" than one which enables the legal representatives of a municipal corporation to assemble in special meeting and pass such ordinance as either the exigency or expediency of the situation demands. And the authorities we find announce that among other implied powers of a municipal corporation is the one which allows a special meeting to be called upon due notice, or to be held without notice where all of the board are present, in which latter case the necessity of notice, in consequence of being waived by universal consent, is dispensed with. 1 Dillon, Municipal Corporations [4 ed.], section 263; 1 Beach, Public Corporations, sections 268, 269. Such waiver occurred in the case at bar when ordinance 35 was passed. This being the case, it is wholly immaterial that section 132 of the ordinances of the defendant city required that should a quorum not be present, the meeting should stand adjourned till the next regular meeting.

Power to call
special meeting
implied

SECTION II. — *Legislative Power.*

VANDINE, PETITIONER.

1828. 6 Pick. 187.

8 cases.

66

By-law of Boston
prohibited any person
carrying garbage
in streets unless
duly licensed by city

PETITION for a writ of certiorari to the Municipal Court of the city of Boston. Vandine was prosecuted upon a by-law of Boston, passed in April 1826, by which it is ordained, that no person shall remove, cart or carry through any of the streets, squares, lanes, or alleys of the city, any house-dirt, refuse, offal, filth or animal or vegetable substance from any of the dwelling-houses or other places occupied by the inhabitants, in any cart, wagon, truck, hand-cart or other vehicle, unless such person so removing, etc. together with the cart, etc. shall be duly licensed for that employment and purpose by the mayor and aldermen, upon such terms and conditions as they shall deem the health, comfort, convenience or interest of the city require, on pain of forfeiting a sum not less than three dollars nor more than twenty.

It was proved at the trial, that Vandine transported house-dirt and offal from the yards of houses to his cart standing in the streets of the city.

Petitioner an
inhabitant of Cambridge

Vandine being called on for his defence, it was agreed that he was an inhabitant of the town of Cambridge, and that he owned and kept there a large number of hogs.

The judge instructed the jury that the subject of the regulation was one on which it was proper for the city to legislate. . . . He further instructed the jury that, so far as by virtue of the general laws of the Commonwealth, the city council had power to make by-laws for governing the city, these regulations were binding on all persons actually resident within its limits, either for business or pleasure, and whether inhabitants or strangers.¹ . . .

1
Did binding on
strangers

PUTNAM, J., delivered the opinion of the Court. The first objection is that this by-law is not binding upon strangers, if it should be considered as binding upon the citizens of Boston.

Some by-laws are binding upon strangers as well as upon the inhabitants or members of the corporation, and some are not. The distinction is between corporations united as a fraternity for the purposes of business, having no local jurisdiction, and corporations having a territorial jurisdiction; the former have not, but the latter have power to make by-laws binding upon strangers.

For example: a by-law of the corporation of Trinity House, "that every mariner, within twenty four hours after anchorage in the Thames, put his gunpowder on shore, does not bind, because the corporation has no jurisdiction upon the Thames." Com. Dig. Bye-law, C 2.

In the case of *Dodwell v. The University of Oxford*, 2 Ventr. 33, the

¹ Part of the instructions and the arguments of counsel have been omitted. — ED.

Chancellor's Court of the University made a by-law, that whoever, privileged or not privileged, should be taken walking in the streets at 9 o'clock at night, having no reasonable excuse, by the proctor, etc. should forfeit, etc. And it was held that the corporation could not make a by-law binding upon any who were not of their body. They went beyond their jurisdiction, which could not be considered as extending to the inhabitants of Oxford who were not scholars. Regard is to be had to the nature of the incorporation; if it is a banking incorporation, for example, their by-laws must be confined to the proper mode of conducting their affairs. Where the corporation has a local jurisdiction, their by-laws affect all who come within it; for example, the by-law of the city of London, that no citizen, freeman or stranger should expose any broad-cloth to sale within the city before it should be brought to Blackwell Hall to be examined whether it were saleable or not, was held binding upon strangers as well as citizens. 5 Co. 63.

So in *Pierce v. Bartrum*, Cowp. 269, a by-law of the mayor and common council of the city of Exeter, that no person should slaughter beasts or keep swine within the walls of the city, was held good against the defendant, who was not free of the city, but only residing there. He was considered as an inhabitant *pro hac vice*. So where the corporation have jurisdiction over all of the same trade or profession within certain limits, as the College of Physicians have for seven miles round London; whose by-laws regulating the practice of physic are binding upon all within those limits.

The by-laws which are made by corporations having a local jurisdiction, are to be observed and obeyed by all who come within it, in the same manner as aliens and strangers within the commonwealth are bound to know and obey the laws of the land, notwithstanding they may not know the language in which they are written. They receive the benefits arising from the municipal arrangements, and are presumed to assent to them, upon the same principle which requires from them a temporary allegiance to the state for the protection it affords to them during their residence.

But it is contended that this by-law is void as it is in restraint of trade, and operates as a monopoly. Every regulation of trade is in some sense a restraint upon it; it is some clog or impediment, but it does not therefore follow that it is to be vacated. If the regulation is unreasonable, it is void; if necessary for the good government of the society, it is good.

The case cited by the counsel for the defendant from 1 Roll. Abr. 364, was of the former character. The mayor and commonalty of London made a by-law, that no carman within the city should go with his cart, without license from the wardens of such an hospital, under a certain penalty for each offence; and it was held to be a void by-law, because it was in restraint of the liberty of the trade of a carman, and it was held to be unreasonable, because it went to the private benefit of the wardens of the hospital, and was in the nature of a monopoly.

2) Pers.

Engl. case.

Now we think that case was rightly decided ; it was an act of oppression. We perceive no reason why the wardens of the hospital should have a superintendence and control of all the business of the carmen, thus laying them under a contribution at the will of the wardens.

To arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city, which would be absurd in the country. The cases upon this subject are well collected by Baron Comyns in his Digest, title "Bye-law." It has been found to be reasonable in the city of London, to provide that brewers' drays should not be in the streets there after eleven o'clock in the morning in summer, and one in winter ; that no person should unlade coals out of a barge, if he be not of the porter's company ; thus in some manner restraining trade.

There have been regulations also adopted in that city, that none shall be brokers unless licensed and sworn ; that none shall be hawkers without license ; thus in some measure restraining the natural rights of the subjects. Now it is contended that the by-law under consideration is in restraint, and not a mere regulation of the trade in which the defendant is engaged ; that he provides as good and tight carts as the men do who are authorized by the city, in the performance of this labor. We do not perceive that there is any more reason to complain of the law requiring a license to do this work, than of the law prohibiting the keeping of livery stables in any place not licensed. One might just as well complain of the regulation which prevents him from being an auctioneer without license ; and so of various other trades and concerns which it is found necessary to subject to such restriction.

The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expense which is deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times and in such manner as would best accommodate them. Every one will see that if this business were thus managed, there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight and poisoning the air with their effluvia. It is obvious, that the object and interest of the city, and those of the carmen, in this concern, are extremely different. But it is contended that the city authorities may regulate strangers and unlicensed persons, in regard to the number of horses and kind of carts to be employed, just as well as they can carts and the conduct of the licensed persons. It seems to us, however, that the city authority has judged well in this matter. They prefer to employ men over whom they have an entire control by night and by day, whose services may be always had, and who will be able from habit to do this work in the best possible way and time. Practically we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against

whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements, nor annoy the inhabitants. We are all satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city.

The direction and opinion of the judge of the Municipal Court was entirely correct.

COMMONWEALTH v. STODDER. 67

1848. 2 Cush. 562.

DEWEY J.¹ The present case comes before us on exceptions to the ruling of the municipal court, upon the trial of a complaint originally instituted in the police court for the city of Boston, and carried by appeal to the municipal court.

The defendant admitted, upon the trial, that he had driven an omnibus set up by a citizen of Roxbury, which carriage ran several times each day from the centre of the most populous part of the city of Roxbury, through the public streets of the city of Boston, for the conveyance of passengers, for hire, to and from Roxbury and Boston, and that he drove the same without any license from the mayor and aldermen of Boston.

A driver running
between Boston & Roxbury.
without license.

The defendant denies that this constitutes an offence, for which he is liable to any penalty of forfeiture. The grounds of the defence raise the question of the legality of the ordinance of the mayor and aldermen, adopted July 12th, 1847; the prosecution being instituted to recover a penalty for a violation of that ordinance.

Viol. of ord.

In the arguments addressed to the court, the question was somewhat discussed, as to the power incident to municipal corporations, to create by-laws of the character here adopted; and a reference was made to various cases in the English courts, where questions of this nature had arisen. Upon examination of those cases, they will be found less important and less satisfactory as guides here, inasmuch as it is quite obvious, that in many of them, and particularly those where the ordinance seemed most questionable, as not being within the ordinary exercise of municipal authority, the by-laws were sustained, upon the ground of ancient and long continued usage, ripening into a prescriptive right, on the part of the municipal corporation.

No such ground can be urged here, and the present ordinance, if sustained at all, must be shown to be authorized by the express provision of the charter, or be derived as an incidental power resulting from its incorporation as a city, or be found in some general or special statute.

¹ Statement of facts and arguments omitted. — Ed.

The city charter (St. 1821, c. 110) contains various provisions bearing upon this subject, (see §§ 1, 18, 15,) which it seems unnecessary particularly to consider, because the power is more directly given to the mayor and aldermen, to act upon this subject, by the statute of 1847, c. 224.

*St. gave city
power to regulate
omnibuses.*

By this statute, it is enacted, that the mayor and aldermen of any city shall have power to adopt such rules and orders, as to them shall appear necessary and expedient, for the due regulation, in such city, of omnibuses, stage coaches, &c., used wholly or in part in such city, whether by prescribing their routes or places of standing, or in any other manner whatsoever. The ordinance of July 12th, 1847, was obviously passed under the authority supposed to be conferred upon the mayor and aldermen by this statute.

We are then brought to the inquiry, whether the authority vested in the mayor and aldermen by the above mentioned statute will authorize the ordinance now sought to be enforced. This question must be answered by considering somewhat in detail the various provisions of the ordinance:

1. As to those portions of the ordinance prescribing the routes and streets, on which certain lines of omnibuses were to pass, and prohibiting such vehicles from being driven on any other route than those thus prescribed, and prescribing their stands.

Regulations of this nature are regulations as to the use of omnibuses and stage coaches, while passing over the public streets of the city, and are within the legitimate powers of the mayor and aldermen. The public safety and convenience of travellers may require regulations of this character. If new and unusual modes of transporting persons over the public streets are introduced, which, from the methods made use of for propelling the carriage, or the size of the vehicle, or the number of horses attached thereto, will obviously endanger the public safety, or so engross the whole width of the street as virtually to exclude all other vehicles, or greatly to obstruct them in their passing thereon, it would certainly be reasonable and proper and within the legitimate powers of the mayor and aldermen, under the statute already cited, and the powers conferred by the city charter, to regulate the route of the streets over which such carriages were to run, and the rate of speed, and to interdict the stopping in the public streets unnecessarily, to the great hindrance and delay of those in the rear travelling on the same route.

We perceive nothing objectionable in an ordinance, by the mayor and aldermen, providing for the safety and convenience of the public generally, by prescribing, by a general by-law or ordinance, certain streets or portions of streets, to be used for travel by vehicles, exposing by their manner of use the lives and limbs of the public generally, who may have occasion to use the public streets, if such vehicles are permitted to use the public streets indiscriminately; and such regulations and restrictions might be warranted even to effect the minor object,

*1) Regulations
prescribing
routes
as valid*

that of preventing the greatly obstructing the free and convenient use of the streets for general purposes, by interdicting carriages of unusual size or drawn by an unusual number of animals, or those of such character as would greatly interfere with the public convenience and safety. To take a strong case: Suppose the proprietor of the omnibuses from Roxbury should deem it expedient to propel his carriages by steam power, passing through Washington Street, at a rapid rate, would it not be a lawful and proper regulation for the mayor and aldermen to prohibit the using of Washington Street by vehicles propelled by steam power? We cannot doubt that it would be.

Acting upon this principle, various ordinances have been adopted by the city government regulating the rate of speed of travellers in the public streets, the hour of the day in which the public streets may be used for certain purposes, and excluding vehicles of all kinds from entering upon the sidewalks on the public streets. So far as relates to the restriction of carriages to certain routes, there is nothing in the ordinance preventing any individual from running omnibuses in every direction. The proprietor of the Roxbury omnibuses, although those particular vehicles are restricted to certain streets, has also the free use of the various other streets, appropriated to other lines of omnibuses, if he chooses to set up and run an omnibus thereon, as to Charlestown, or Cambridge, or South Boston.

We cannot doubt that a by-law, reasonably regulating the use of the public streets of the city as to carriages of an unusually large size, or as to those which from the mode of using them would greatly incommode, if not endanger, those having occasion to use such public streets, would be valid and legal; and that such regulations might prescribe certain streets as the route of travel for such vehicles, and provide for their exclusion from certain other streets.

2. The next inquiry is, whether it was competent for the mayor and aldermen to require as a condition precedent to the setting up of an omnibus, or stage coach, to run from the centre of Roxbury to the central part of the city of Boston, and carrying passengers for hire, the payment of the sum stated in § 8 of the by-law of July 12th, 1847, and the obtaining a license as required in § 2 of the same ordinance.

This question embraces two points of inquiry, which are to some extent distinct in their character: 1. The right to demand the payment of a tax or duty on each carriage licensed, varying from one to twenty dollars, according to the different kinds of carriages, and the stands they occupied; and, 2. The right to forbid all persons from setting up such omnibuses or stage coaches, without a license from the mayor and aldermen of the city of Boston.

As to the requisition of a payment of money, operating as it does as a direct tax upon the vehicle to be used, we can find no authority for this provision of the ordinance. Taxes are to be levied under the provisions of general laws enacted by the legislature. We look in vain for authority for it either in the city charter, or the statutes of the

2) Tax on
the vehicle

Power to regulate does not include power to tax.

commonwealth. The act of 1847, c. 224, under and by virtue of which this ordinance of July 12th, 1847, was professedly adopted, merely authorized the mayor and aldermen to adopt rules and orders "for the due regulation, in such city, of omnibuses, stages, &c." The power here conferred was not a tax levying power. The title of the act was "An act to prevent obstructions in the streets of cities and to regulate hackney coaches and other vehicles." All the apparent objects of the act may be secured by due regulations as to the time, place and mode of using such vehicles, irrespective of any payment of a specific duty or tax upon them, as provided in the ordinance. As a tax, it would operate unjustly also, as requiring to be paid to the city of Boston a specific duty or tax upon a vehicle owned and used by an inhabitant of another town or city, in which alone he should be taxed for his personal property.

We are aware, that there are a few cases where a sum of money has been required to be paid on obtaining a license for exercising certain employments. But they are cases directly authorized by a statute law of the commonwealth. It would seem to be peculiarly proper where the tax would be a tax upon inhabitants of various towns, that it should be directly authorized by a general law of the commonwealth, in the enacting of which all the towns in the commonwealth would be heard, and would act upon the subject through their representatives.

In the case of *Boston v. Schaffer*, 9 Pick. 415, where a payment of money for a license for a theatrical exhibition was held a legal payment, the by-law requiring the payment of money was held valid as a power clearly conferred by the statute of the commonwealth, (1821, c. 10,) authorizing the mayor and aldermen to license theatrical exhibitions, "on such terms as the mayor and aldermen should think expedient," and upon that ground was sustained. It furnishes no authority for an imposition of a tax under the powers conferred upon the mayor and aldermen by the statute of 1847, c. 224, authorizing them "to regulate hackney coaches and other vehicles."

If the sum here required to be paid were a mere provision for paying the expenses incident to giving a license, as was apparently the statute of 1796, c. 32, requiring the payment of one dollar for each license, it might be unobjectionable, if the requiring the license was itself well authorized; but the dissimilarity in the sums required to be paid, varying as they do from one dollar to twenty dollars, for a vehicle, precludes us from any assumption of that sort. Nor can any such tax be sustained upon the ground suggested in the argument, that the sum levied is not more than sufficient to indemnify for the expenses incident to the supervision of hackney coaches, omnibuses, stages, &c. In no aspect in which we have been able to regard this part of the ordinance, can we view it in any other light, than as an assessment of a tax upon the owners of these vehicles. As such, the court are of opinion, it was without legal authority, and as the obtaining of a license in all cases requires this payment, the ordinance, so far as it ordains, that

Tax here not
city pays
expenses of license

on
the license
to

no person shall set up, use, or drive, in the city of Boston, any omnibus, without a license from the mayor and aldermen, under a penalty of not less than five nor more than twenty dollars, every time such carriage is used, is illegal and cannot be enforced.

Tax 60-1

A similar question arose in the case of *Dunham v. Trustees of Rochester*, 5 Cowen, 466, where, under an act authorizing the trustees of a village corporation to make by-laws "in relation to hucksters, and for good government of the village," it was held, that the act did not authorize a by-law that hucksters should be required, before exercising their employment, to take a license, and be taxed a sum varying from five to thirty dollars.

Upon the ground of the requisition of the payment of a sum of money obviously intended as a tax upon the owners of the vehicles, the defence of the present case might well be sustained.

3. But as the other branch of the inquiry has been fully opened in the argument, we have proceeded to inquire further as to the validity of an ordinance of the mayor and aldermen, forbidding any person resident in another town from setting up, using, or driving an omnibus or stage for the carriage of persons for hire, from such other towns to the central parts of the city of Boston, without a license from the mayor and aldermen of the city of Boston, supposing no payment of money had been required. How far the general powers conferred by the city charter and the statutes of the commonwealth may well authorize the city government in requiring licenses previous to the exercise of certain trades or occupations, by citizens of Boston, and wholly within the limits of the city, we have not particularly considered. A long usage of this kind has certainly prevailed to some extent, under the authority supposed to be derived from the general power of the city government; but, in these cases, it will be seen, that it has usually been vested in the city government by express enactment by a statute of the commonwealth. Thus, the practice of licensing hackney coaches, so long practised in this city, was directly authorized by the statute of 1796, c. 32; the licensing of dealers in second hand articles, under a city ordinance, was authorized by statute of 1839, c. 53; the licensing of theatrical exhibitions by statute of 1821, c. 10; and the licensing of porters was also under a statute. On the other hand, the requiring of licenses of common criers, of those persons who are hawkers of goods, and the licenses of chimney sweepers were solely by ordinances.

3) Remuneration
These licenses
also void

The requiring a license before any person should be employed in removing house dirt and offal from the city, is by an ordinance. This latter ordinance came directly before the court in the case of *Vandine, Petitioner*, 6 Pick. 187, and was held a valid by-law.

In the case of *Nightingale, Petitioner*, 11 Pick. 168, a by-law requiring a license before opening for sale certain commodities in certain streets was held valid.

Without calling in question the power of the mayor and aldermen to establish by-laws forbidding the exercise of certain employments,

no notice nec.
 en no pot
 its involved
 Co. v. City. //

private rights. The counterpart of the general rule above suggested is, I believe, of universal application, that, when private rights are not involved, notice to private persons is not essential.

The matters dealt with in the ordinance now under review, and of which complaint is made, the adoption of the trolley system and the laying of double tracks in the street, do not involve private rights.

It may be that the legitimate use of the street by the abutting owners will interrupt the passage of cars upon double tracks more frequently than it would if there were only a single track, but, as we have seen, the private right will not, on that account, be diminished; the public using the tracks must put up with the interruption. *Rafferty v. Central Traction Co.*, 147 Pa. St. 579. If this ordinance defined the position of the poles, and thus determined whether the possible inconvenience which they might occasion should be borne by one abutting owner rather than another, then perhaps, as is intimated in the equity cases before mentioned, private rights would be so concerned as to require notice; but the ordinance attempts no such location.

Notice therefore was not necessary, unless prescribed by the statutes under which the municipal authorities were acting. These statutes are the charter of the Jersey City and Hoboken Horse Railroad Company (Pamph. L. 1859, p. 550), an act transferring all its powers, privileges and franchises to the North Hudson County Railway Company (Pamph. L. 1874, p. 1264), and a supplement to "An act concerning street railroad companies" (Pamph. L. 1893, p. 241). None of these acts directs notice to be given.

The prosecutors' next objection is that the company has not filed a map or survey of its route. The complete answer is that none need be filed. Pamph. L. 1874, p. 1264, § 4.

Another objection is that in authorizing a double track the ordinance is unreasonable, in view of the narrowness of the street and its other uses. The act of 1859, above referred to (Pamph. L., p. 550, § 7), expressly empowers the city authorities to designate the number of tracks that shall be laid in any street, lane or avenue of the city. This delegation of power is too specific to permit the court to overturn the ordinance on the ground stated. *Haynes v. Cape May*, 21 Vroom, 55; *Trenton Horse Railroad Co. v. Trenton*, 24 id. 132.

It is further objected that the ordinance, in empowering the company to construct "any and all necessary curves, sidings, crossovers and switches, that may be required for the proper, safe and economical operation of the railway," is unreasonably vague, and delegates a discretion which the municipal board itself was bound to exercise.

This objection is valid. The act of 1859, section 7, and the act of 1874 (Pamph. L., p. 1264, § 3), forbid the laying of any track or tracks along any street, unless the consent of the governing municipal body be first obtained. We think this language fairly implies that the public body shall know what particular tracks the company proposes to lay before it determines whether it will consent or not. Only in

See
 notes
 252 1/2

of ord.
 ect where
 power
 given.

this way can the public representatives give to public interests that protection which the legislature designated.

The last objection to be considered is that the ordinance does not prescribe the manner in which or places where the poles shall be located, or the manner in which wires shall be strung thereon.

This objection rests upon the third section of the supplement of 1893, before mentioned (Pamph. L., p. 241), which enacts that the municipal authorities may, when they deem it proper, authorize the use of poles to be located in the public streets, with wires, &c., "and when a board grants such authority it may in such case prescribe the manner in which and the places where such poles shall be located, and the manner in which the wires shall be strung thereon, and the same may be authorized and prescribed by ordinance."

The question at once arises whether the language, "it may in such case prescribe the manner," &c., imposes a duty on the public body, or merely clothes it with a discretionary power.

Ordinarily the word "may" implies permission only, but often it is construed to be mandatory. It is noticeable that in this very section the term is used in both senses. In the first clause, that the municipal authorities may, when they deem it proper, authorize the use of poles, &c., it clearly was intended to vest the authorities with discretionary power; while in the last clause, "and the same may be authorized and prescribed by ordinance," the term is mandatory, and in no other mode can the power be exercised. The sense of the word in the middle clause now under consideration is less clear, but I think it is mandatory. The general rule is that this force will be given to the word whenever it is employed in a statute to delegate a power, the exercise of which is important for the protection of public or private interests. Sedgw. Stat. & Const. L. 438; *New York v. Furze*, 3 Hill 612; *Central Land Co. v. Bayonne*, 27 Vroom 297; 14 Am. & Eng. Encycl. L. 979. It is undoubtedly of importance to public interests that the poles and wires which are to convey so dangerous an agent as electricity through the public streets should be properly placed and constructed. This is not secured by the provisions of this ordinance, which merely require the poles to be erected on the sidewalk adjacent to the curb-line, and the wires to be suspended seventeen feet above the grade of the street. For this reason also the ordinance is illegal.

The defendants suggest that the prosecutors have no standing to question the legality of the ordinance. But when it is remembered that the railway company is intending to place tracks, poles and wires upon the lands of the prosecutors, and that it has no right to do so, except under public authority lawfully conferred, it becomes evident that the prosecutors are entitled to question the legality of the authorization. *Read v. Camden*, 25 Vroom 347.

So far as it purports to affect the lands of the prosecutors the ordinance must be set aside.

4) Ord. in d. for
not pres.
manner in which
poles located

St. requires Bd
to prescribe this
altho St. says
"may"

111

HAWES v. CHICAGO.

1896. 158 Ill. 658.

69

*Sp. ass.
Ord. required
construction of
cement sidewalk*

*Held void, as
unreasonable*

BAKER, J. This is an appeal from a judgment of confirmation of a special assessment made under an ordinance of the city of Chicago passed March 7, 1892, and providing for the construction of a cement sidewalk on Fiftieth street, from Lake avenue to Drexel boulevard. The commissioners appointed to assess the cost and expenses of the improvement upon the property benefited thereby, returned into court an assessment roll, in which the property here in question, then owned by John H. Dunham, since deceased, was assessed in the sum of \$1915.50. Various objections, in writing, were filed by said Dunham and overruled by the court. The question of benefits was submitted to a jury, and the jury, in their verdict, reduced the assessment on the property to \$1638.75. Motions for a new trial and in arrest of judgment, as well as motions to dismiss the petition and to cancel the assessment, were made by the objector and overruled by the court, and exceptions taken, and the court entered judgment of confirmation for the amount fixed by the verdict of the jury, and the objector perfected an appeal to this court. John H. Dunham, the objector, thereafter died, and his death was suggested, and by leave of court Helen Elizabeth Dunham Hawes and Mary Virginia Dunham, who are his heirs-at-law and devisees under his will, now prosecute the appeal.

It is claimed by appellants that the ordinance providing for the construction of the cement sidewalk, and under which the assessment was made, is unreasonable, unjust and oppressive, and therefore void. The uncontradicted evidence in the case shows that the tract of land, the south fifty feet of which is assessed for this improvement, is a twenty-acre tract, having a frontage of 1256 feet along Fiftieth street, where it is proposed to construct this cement sidewalk; that there is not a house or a building of any kind upon it, and that it is an unsubdivided tract of land, and the only use to which it is put is that of a field for raising hay. Only five months before the passage of this ordinance for the construction of a cement sidewalk, the devisor of the appellants in this case, in compliance with a prior ordinance of the city duly passed for that purpose, constructed and put down along the line of this street, in the very place where this cement sidewalk is to be placed, a wood sidewalk six feet in width, made of plank laid crosswise on stringers or joists, in strict conformity to the regulations and requirements of the city, and this plank sidewalk, at the time this ordinance on which the present proceedings are based was passed, and at the time this case was heard in the court below, was in good order and condition. The uncontradicted evidence further shows that the street along which it is proposed to construct this cement sidewalk has never been improved by the city. It is neither curbed nor paved, sewered nor watered, surveyed nor graded. If it is to be considered as a street sixty-six

*a)
Prop. was open field*

*b)
mos. before
prior ord. had
required wood
sidewalk*

*c)
Street not
improved*

feet wide, then there is a line of telegraph poles planted right through the center of it, and the north thirty-three feet of it has never been formally dedicated by the owner to public use nor condemned by any municipal corporation, and if the public have any right to it at all, it is a right by prescription or by implied dedication.

Such was and is the condition of this street in front of appellants' property, and yet, as appears from the record of the case, the common council of the city of Chicago, only five months after the construction, at a great expense, of a new plank sidewalk, built in conformity with the order of the city council, 1256 feet long, passed a second ordinance ordering this new plank sidewalk torn up and a cement walk, at an assessed expense of \$1915.50, or \$1638.75, put down in its place. It is admitted by the city — at least not denied — that this plank or wooden sidewalk, at the time the ordinance for the cement sidewalk was passed and at the time this case was heard in the court below, was in good order and condition, and will answer equally as well, for the purposes of travel, as a cement walk. Now, can it for a moment be contended that it is not unreasonable, unjust and oppressive to compel the owner of a vacant twenty-acre lot first to construct and pay for a wood sidewalk, and then, within less than six months, and when it is in substantially as good condition as when first built, and in all respects safe, convenient and sufficient for public use and travel, take it up, throw it away and put down another in its place at an expense of over \$1600? It seems to us that it cannot be, especially when we take into consideration the fact that the street has never been improved, curbed, graded, paved or sewered. And further; it is clear, from the evidence in the case, that if this judgment should be affirmed and appellant compelled to take up the wood sidewalk and put down one of cement, the cement sidewalk will be ruined by putting in the house drains every twenty-five feet along the line of the street, or at least seriously injured, and whenever the street is improved and dwellings are constructed along the line of the walk the walk itself is quite likely to be destroyed.

An ordinance must be reasonable, and if it is unreasonable, unjust and oppressive the courts will hold it invalid and void. (*City of Chicago v. Rumpff*, 45 Ill. 90; *Tugman v. City of Chicago*, 78 id. 405). The question of the reasonableness or unreasonableness of a municipal ordinance is one for the decision of the court, and in determining that question the court will have regard to all the existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption. (*Toledo, Wabash and Western Railway Co. v. City of Jacksonville*, 67 Ill. 37; *City of Lake View v. Tate*, 130 id. 247; 1 Dillon on Mun. Corp. sec. 327.) And even where the power to legislate on a given subject is conferred on a municipal corporation, yet if the details of such legislation are not prescribed by the legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof, or it will be pronounced invalid. 1 Dillon on Mun. Corp. sec. 328; *City of St. Paul v. Collier*, 12 Minn. 41;

Requirement of
rep. to cement is
unreas.

Unreas = gm for C

It will consider
all existing
circumstances
(conditions)

del
[unclear]
[unclear]

Dunham v. Trustees of Rochester, 5 Cow. 462; *Breninger v. Belvidere*, 44 N. J. Law, 350.

In Cooley on Taxation (p. 428) it is said: "A clear case of abuse of legislative authority in imposing the burden of a public improvement on persons or property not specially benefited would undoubtedly be treated as an excess of power, and void." In *Allen v. Drew*, 44 Vt. 174, the court, by REDFIELD, J., says: "We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name." In *Wistar v. Philadelphia*, 80 Pa. St. 505, Chief Justice AGNEW says: "But if we say the city may change its pavements at pleasure, and as often as it please, at the expense of the ground owner, we take a new step, and there must be explicit legislation to authorize such taxation. If, while the pavement is good and stands in no need of repair, the city may tear it up, relay, and charge the owner again with one excessively costly, it would be exaction — not taxation. We are not at liberty to impute such a design to the legislature, unless it has plainly expressed its meaning to do this unjust thing." And in *Wistar v. Philadelphia*, 111 Pa. St. 604, it is held that where a property owner has well and properly set curb-stones in front of his property, at his own expense, on the proper line, in accordance with the style in common use, and they are in good order and repair, the expense of replacing them with others cannot be provided by an assessment upon his property. In *Corrigan v. Gage*, 68 Mo. 541, it was held that the ordinance for the paving of the sidewalk there in question was unreasonable and oppressive and subject to judicial inquiry, because such sidewalk was in an uninhabited portion of the city and disconnected with any other street or sidewalk, and the judgment of the court below was reversed. In *City of Bloomington v. Chicago and Alton Railroad Co.*, 134 Ill. 451, this court held that where the ordinance is grossly unreasonable, unjust and oppressive, that may be shown in defense of the application for confirmation. In *City of Bloomington v. Latham*, 142 Ill. 462, we held that an ordinance directing that the cost of the land taken or damaged, or both, should be assessed upon and collected from the lands abutting upon the proposed alley or street, in proportion to the frontage thereof, was unreasonable and void. And in *Davis v. City of Litchfield*, 145 Ill. 313, and *Palmer v. City of Danville*, 154 id. 156, ordinances levying special taxes for local improvements were held to be unreasonable, arbitrary abuses of power, and void.

The rule is, that it requires a clear and strong case to justify a court in annulling the action of a municipal corporation, acting within the apparent scope of its authority. But in our opinion such a case appears in this record. We think that the ordinance in question, in so far as and to the extent that it affects the property of appellants, is unreasonable, unjust and oppressive, and therefore void.

The judgment of confirmation as to the property of appellants is reversed, and, the ordinance being void as to such property, the cause will not be remanded.

Judgment reversed.

EX PARTE MCCARVER.

70

1898. 39 Tex. Cr. 448.

HENDERSON, J.¹ This is an appeal from a proceeding under a writ of habeas corpus. It appears in the city of Graham, Young county, the city council have passed what is termed a "curfew ordinance."

Curfew order

That after said ordinance went into effect the relator, a young man 19 years of age, was found by the city marshal of the city of Graham on the street more than fifteen minutes after the city marshal had rung the curfew bell at the Baptist Church, in said city, on the night of the 18th of April, 1898. That said marshal held and detained him for a violation of said ordinance. He sued out a writ of habeas corpus, and, upon an examination of the case, he was remanded by the county judge, and he now prosecutes this appeal.

The question here presented is as to the legality of said ordinance. If it be such a one as the city council had a right to pass, then the relator is entitled to no relief; otherwise he is. It appears that a distinction is made between ordinances passed under an express grant or power by the Legislature and ordinances which are merely passed under a general power. As to the former, courts are not inclined to inquire into their reasonability, but as to the latter, if an ordinance does not appear to be reasonable, the courts will declare them void. See 17 Am. and Eng. Enc. of Law, p. 247, and authorities there cited; Cool. Const. Lim. 4 ed., pp. 243, 244, and note.

*Dist. for ord.
passed under
express grant
of power.*

We will treat the question on the proposition as to whether or not, conceding that the municipality has authority under its general powers to pass any ordinance that is reasonable to preserve the public peace and to protect the good order and morals of the community, the ordinance in question is reasonable. We hold that it is not; that it is paternalistic, and is an invasion of the personal liberty of the citizen. It may be that there are some bad boys in our cities and towns whose parents do not properly control them at home, and who prowl about the streets and alleys during the nighttime and commit offenses. Of course, whenever they do, they are amenable to the law. But does it therefore follow that it is a legitimate function of government to restrain them and keep them off the streets when they are committing no

¹ Argument and part of the opinion omitted. — Ed.

offense, and when they may be on not only legitimate errands, but engaged in some necessary business. At common law a conspiracy was an indictable offense, and under our statute a conspiracy to do certain things is an offense. If persons go upon the street, whether under or over age, in pursuance of a conspiracy to commit burglary or some other offense, they are indictable. But it is not claimed here that the going upon the streets by appellant was in pursuance of any conspiracy to commit any offense. We understand it to be made unlawful for any person under 21 years of age to go upon the streets after 9 o'clock at night, or, more strictly speaking, later than fifteen minutes after the ringing of what is called the "curfew bell" provided for by the ordinance. True, some exceptions are made. For instance a person under 21 years of age may go upon the streets with his parent or guardian, and such person can go upon the streets in search of the services of a physician, but these are the only exceptions. We can well imagine a number of other exceptions. Indeed, so numerous do they occur to us that they serve themselves to bring into question the reasonability of the law. A minor may be unavoidably detained away from home until after night, yet in passing along the streets on his way to his home he commits an offense. He may be at church or at some social gathering in the town, and yet when the curfew bell tolls in the midst of a sermon or exhortation, he would be compelled to leave and hie himself to his home, or, if at a social gathering, he must make his exit in haste. He could not be sent by his parents to a drugstore, or, for that matter, on any errand, save and except for a physician. The rule laid down here is as rigid as under military law, and makes the tolling of the curfew bell equivalent to the drum taps of the camp. In our opinion, it is an undue invasion of the personal liberty of the citizen, as the boy or girl (for it equally applies to both) have the same rights of ingress and egress that citizens of mature years enjoy. We regard this character of legislation as an attempt to usurp the parental functions, and as unreasonable, and we therefore hold the ordinance in question as illegal and void. See *City of St. Louis v. Fitz*, 53 Mo. 582; *City of Chicago v. Trotter*, (Ill. Sup.) 26 N. E. 359. The relator is ordered discharged.

STATE v. BOARDMAN. 71

1899. 98 Me. 73.

ord. limiting
transportation
stone. loads

WISWELL, J. Complaint for the alleged violation of the following ordinance or by-law of the town of Rockport: "All of that portion of Union Street in Rockport situated Northerly and Westerly and within fifteen (15) feet of the Northerly and Westerly rail of the Electric R. R. track, is hereby set apart and designated as the portion of said street over and upon which lime-stone may be transported on wheels, also all other material on wheels, where the load, exclusive of cart, wagon or

vehicle, exceeds 2,500 pounds in weight; and all persons are prohibited ~~from using any other portion of said street~~ for the purposes aforesaid; and any person engaged in transporting lime-stone on wheels or other material of the weight aforesaid, on wheels, using any other portion of said street for such purpose, shall be fined not less than two nor more than five dollars for each offense, to be recovered, by complaint, to the use of the town of Rockport."

The respondent attacks the validity of this by-law upon three grounds, namely, because it had never been approved by the county commissioners of Knox county or by a justice of the Supreme Judicial Court; because it is inconsistent with the laws of the State; and because it is unreasonable. Must such an ordinance be approved by the county commissioners or by a justice of this court? We think not.

The legislature of this state has by various enactments at different times given to municipalities the power to adopt by-laws in regard to a large number of matters, all of which different enactments have been condensed into c. 3, § 59, of the present revised statutes. As that section now reads municipalities are authorized to adopt such ordinances for the purposes named in twelve separate paragraphs. By paragraph I, "For managing their prudential affairs," such by-laws must be approved by the county commissioners or by a judge of this court; but in regard to by-laws in relation to the purposes, enumerated in the other eleven paragraphs of the section, no such approval is made necessary.

The words "prudential affairs" are certainly very indefinite and unsatisfactory, and it might be a very difficult matter in many cases to determine just what is or is not included within the meaning of the expression. This term was taken from the Massachusetts statute where the same difficulty has been appreciated. In the case of *Spaulding v. Lowell*, 23 Pick. 71, Chief Justice Shaw said: "The ambiguity lies in the indefinite term, 'prudential affairs,' and the difficulty arises in each case in settling what concerns fall within it." But however indefinite the term may be, that it was not intended to cover the matters enumerated in the other paragraphs of the section, is shown, we think, both by the language of the original enactments and the text and arrangement of paragraphs in the section of the revision, by which towns are empowered to make by-laws in regard to police regulations; respecting infectious diseases; for setting off portions of streets for sidewalks; in regard to the erection of wooden buildings; and as to various other matters.

The authority of a municipality to adopt such an ordinance as the ~~one here under consideration~~ is given, we think, by paragraph IX: "For the regulation of all vehicles used therein, by establishing the rates of fare, routes and places of standing, and in any other respect."

~~So therefore it only remains to inquire whether this by-law is inconsistent with law or is unreasonable.~~ We are unaware of any law of the State which it contravenes. All public ways and streets are for the

Rt to use st.
may be regulated

accommodation primarily of travelers of all classes and kinds, but the traveler is not in all, or in many cases, entitled to the whole width of the street for his accommodation. He is entitled to a reasonably safe, convenient and practicable opportunity for travel and passage. A portion of a way as located, not being needed for travel, may be left outside of the wrought road, another portion may be set off for sidewalks and the use of the remaining width of the way so regulated that heavily loaded teams and other vehicles shall use exclusively different portions thereof, and still no one would be deprived of his rights, but upon the other hand all might be very much benefited in the exercise of them.

Highways and streets are of course for the public use, they are not alone for the people of the municipality in which they are located, and such ways cannot be considered in any sense the easement or property of the town; but the municipality in which a public way is located has been vested by the legislature with the supervision and control of such ways for public use, and are charged with the responsibility of keeping them in repair and reasonably suitable and sufficient for use by the public for purposes of travel. The power to properly regulate the use of ways so as to preserve for all the rights of all is not inconsistent with any provision of law.

Such a by-law does not deprive a person of any right, it simply regulates the exercise of it, and it can be readily seen that such a regulation may afford to all travellers much better opportunities for travel than they could otherwise enjoy.

In *Commonwealth v. Stodder*, 2 Cush. 562, the court said: "We cannot doubt that a by-law, reasonably regulating the use of the public streets of the city as to carriages of an unusually large size, or as to those which from the mode of using them would greatly incommode, if not endanger, those having occasion to use such public streets, would be valid and legal; and that such regulations might prescribe certain streets as the route of travel for such vehicles, and provide for their exclusion from certain other streets."

Was this by-law reasonable? By its terms all persons passing over the street named, with any vehicle on which there were loads exceeding 2,500 pounds in weight, are restricted to the use of fifteen feet of the width of the street next to the electric railroad track. That this would be a reasonable, and in many cases a most salutary regulation, we have no doubt; but such a by-law might be unreasonable, if that portion of the way to which such vehicles were restricted was allowed to become in such a condition as to be impassable, that is, if the only portion of the way which the by-law allowed to be used for heavily loaded vehicles could not be at all used, because it had been allowed to become in such a condition of want of repair as to be impassable, then that portion of the public, who had occasion to use the way for this purpose, would be absolutely deprived of their right to use the way for the purpose of travel.

might be so
that it is impossible

For such a by-law then to be reasonable and valid, with reference to such a way and in such a locality as in this case, that portion of the street which may be used by heavily loaded vehicles must be reasonably suitable for the purpose; and the by-law will be valid or invalid depending upon whether that portion of the way, to which such vehicles are restricted, is or is not reasonably suitable for the purpose.

Here the defendant offered evidence tending to prove that the fifteen feet in width of street next to the railroad track was absolutely impassable. The evidence was excluded. We think it should have been admitted because, if true, the by-law became unreasonable.

It is true that the question of the reasonableness of a by-law is for the determination of the court, and this conclusion does not take away from the court the determination of the question: certain facts will have to be passed upon by the jury; but the standard upon the question of the reasonableness or otherwise of the by-law is established by the court.

Exceptions sustained.

ELKHART v. MURRAY.

72

1905. 165 Ind. 304.

MONKS, C. J. This action was brought by the city of Elkhart for the violation, by appellee, of an ordinance which provides that "It shall be unlawful on and after May 1, 1903, to run any street car within the limits of said city without having securely fastened to its front end a Hunter Automatic Fender, made by the Hunter Automatic Fender Company, of Covington, Kentucky, or some other fender equally as good, to be approved by the common council or its street committee." The court below held the ordinance invalid, and rendered judgment in favor of appellee.

There was no law in force in 1903, when said ordinance was passed, granting, in express words, to cities of the class to which appellant belonged the power to require street cars running within the city limits to be equipped with fenders. But, assuming that such power may be implied from those granted (*People v. Detroit United Railway* [1903], 184 Mich. 682, 97 N. W. 36, 63 L. R. A. 746, 749, and cases cited), was said ordinance a reasonable exercise of that power? Such power, if possessed by the city, must be exercised by ordinance. The ordinance must contain permanent legal provisions operating generally and impartially upon all within the territorial jurisdiction of such city, and no part thereof be left to the will or unregulated discretion of the common council or any officer. If an ordinance upon its face restricts the right of dominion which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the city authorities, it is invalid, because it fails to furnish a uniform rule of

*Validity of ord.
depends on the
portion of street
to which it is
restricted.
Is it reasonable
for the purpose?*

*Evid. of impass-
able street
should have been
admitted.*

*Ord. requiring
use of fenders
not approved by
common council*

*City has no
power to restrict
the right of
dominion of the
owner of a street
car.*

In *Bessonies v. City of Indianapolis, supra*, at page 197, this court said: "Without any provision as to the location or management of hospitals, the ordinance attempts to make it unlawful for any one to establish or conduct one without a license or permit from the common council and board of aldermen; and the granting or refusal of the license or permit is not governed by any prescribed rules, but rests, in such case, in the uncontrolled discretion of the common council and board of aldermen. It is apparent, that, under the ordinance, if valid, the common council and board of aldermen have the power to grant or refuse the license in any given case, at their mere pleasure; and that no one can conduct or maintain a hospital within the city, however harmless or beneficial it might be, except by the consent of the common council and board of aldermen. It is not necessary to suppose that the common council and board of aldermen would abuse the power thus assumed by them, to grant or refuse the license, as they might think proper, or that they would exercise it otherwise than as they might think for the public good. It is sufficient to say, that, if the ordinance is valid, the common council and board of aldermen have it in their power to grant one person a license, and refuse another, under the same circumstances. No law could be valid, which, by its terms, would authorize the passage of such an ordinance. The twenty-third section of the bill of rights provides, that 'The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' What the legislature cannot do directly in this respect, it cannot authorize a municipal corporation to do."

Some did have
power
to cease to
be. Their order
was different.

In *City of Richmond v. Dudley*, *supra*, at page 116, this court said: "It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities, between citizens who will so comply."

Ord. must specify
rules & conditions
to be observed.

It will be observed that said ordinance requires the use of the particular fender described herein, or some other fender equally as good, to be approved by the common council or street committee. The ordinance, if valid, vests in the common council and street committee an arbitrary discretion which they may exercise or not at their pleasure. They have the power to approve a fender for use by one street railroad company, and refuse approval of the same fender for use by another company under the same circumstances and conditions. They also have the power to approve one or more fenders, and refuse approval of other fenders equally as good or better, whether made by the street railroad company or some one else, thus arbitrarily discriminating in favor of some manufacturers and against others. It is the fact that said officers have the power to do this, and not that they will do so, that renders said ordinance invalid.

Ord. would be
arbitrary because
of discretion
of discrimination.

Judgment affirmed.

COMMONWEALTH v. MALETSKY.

73

1909. 208 Mass. 241.

COMPLAINT filed in the police court of Chelsea on August 18, 1908, charging the defendant with using a certain building in Chelsea for the purpose of picking, sorting and storing rags therein, without a permit in writing from the chief of the fire department of Chelsea.¹

SHELDON, J. The first sentence of c. 30 § 64, of the City Ordinances of Chelsea reads as follows: "No person shall use, occupy or maintain any building for the purpose of picking, sorting, or storage of rags therein, without a permit in writing from the chief of the fire department." The fundamental question now presented is whether this prohibition can be enforced as a valid exercise of the police power. And the question really is whether the prohibition can be upheld under the provisions of R. L. c. 104, § 1, that "Every city, except Boston, and every town which accepts the provisions of this section or has accepted the corresponding provisions of earlier laws

Ord. requires
permit in writing
from chief of
fire dept.

The statement of facts is omitted.—Ed.

St. gave power
to regulate
use of flags
for fire protection

may, for the prevention of fire and the preservation of life, by ordinances or by-laws not inconsistent with law and applicable throughout the whole or any defined part of its territory, regulate the inspection, materials, construction, alteration and use of buildings and other structures within its limits, except such as are owned or occupied by the United States or by the Commonwealth and except bridges, quays and wharves, and may prescribe penalties not exceeding one hundred dollars for each violation of such ordinances or by-laws." This ordinance cannot be sustained under the authority given by R. L. c. 25, § 23, or by St. 1902, c. 187, for the reason that the penalty authorized by these statutes is limited to \$20, while the penalty for the violation of any of the provisions of the chapter before us is a fine of not less than \$20 nor more than \$100. And this ordinance appears to have been intended wholly to guard against the danger of fire. Accordingly it cannot be sustained on the ground of *Commonwealth v. Hubley*, 172 Mass. 58.

to regulate
use of flags
for fire protection

We assume that it was within the power of the municipal authorities to decide that rags were more inflammable than many other articles, and that the business of picking, sorting, or storing them involved peculiar danger of fire, and therefore that ordinances properly might be passed to regulate the materials and construction of buildings used for that business and to provide for the inspection and fix the mode of use of such buildings. This is within the principle of many decisions. *Salem v. Maynes*, 123 Mass. 372; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, stated in *Commonwealth v. Sisson*, 189 Mass. 247, 253; *Commonwealth v. Parks*, 155 Mass. 531; *Newton v. Joyce*, 166 Mass. 88; *Clark v. South Bend*, 85 Ind. 276; *Green v. Lake*, 60 Miss. 451; *In re Hang Kie*, 69 Cal. 149; *McCloskey v. Kreling*, 76 Cal. 511; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703. Similar doctrines have been affirmed in other cases. *Commonwealth v. Plaisted*, 148 Mass. 375; *Commonwealth v. Mulhall*, 162 Mass. 496; *Commonwealth v. Packard*, 185 Mass. 64, 65; *Austin v. Tennessee*, 179 U. S. 343. The mere fact that one effect of such regulations will be to exclude some individuals from certain occupations, or to prevent them from using their property in some advantageous manner which otherwise would not be unlawful, will not make the regulations invalid. *Commonwealth v. Sisson*, 189 Mass. 247; *Commonwealth v. Hubley*, 172 Mass. 58; *Slaughter House Cases*, 16 Wall. 36; *Mugler v. Kansas*, 123 U. S. 623; *Powell v. Pennsylvania*, 127 U. S. 678. But §§ 9 and 67 of the ordinance before us, the validity of which sections is not brought in question, have provided for the materials and construction of buildings to be used for this business. Can the city of Chelsea also forbid any one from using for this purpose a building constructed in exact conformity with its requirements unless he shall also have procured a written permit to do so from the chief of its fire department? The effect of this additional requirement is to leave it wholly to the will of that officer whether or not any per-

Ord. before us
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son shall be permitted to engage in this business. No rules are provided for the exercise of his judgment; there is no appeal from his determination to the city council or the board of control. (St. 1908, c. 559), the department of the city government which was entrusted by the Legislature with the exercise of this power. Doubtless it is to be expected that a subordinate officer entrusted with such unlimited power will use it wisely and with a view only to the public good; but, as in *Winthrop v. New England Chocolate Co.*, 180 Mass. 464, 466, there is nothing in the ordinance to guide him in passing upon the applications that may be made to him. His action in revoking a permit once issued may be appealed from; but his refusal to issue any permit is final. It is left entirely to his untrammelled discretion whether the business of keeping or sorting rags shall be carried on at all in Chelsea, or whether, if carried on, it shall be confined to persons of one nationality or of one way of thinking in religion or politics. As in *Newton v. Belger*, 143 Mass. 598, 599, there are no regulations to guide the applicant for a permit as to what he must do or what qualifications he must show in order to entitle himself to a permit. Every person, however careful and however well qualified, is forbidden to use any building, although absolutely fireproof, for the storage of any rags, although quite incombustible, without a permit which no qualifications might enable him to obtain. Neither expressly nor by necessary implication is the chief of the fire department required to base his action in granting or refusing a permit upon the danger of fire involved. It has been held that when such unlimited power has been granted by the Legislature to certain designated municipal boards or officers, an ordinance by which they undertake to delegate this power absolutely to a subordinate officer will be merely void. *Coffin v. Nantucket*, 5 Cush. 269; *Day v. Green*, 4 Cush. 433; *Lowell v. Simpson*, 10 Allen, 88; *Commonwealth v. Staples*, 191 Mass. 384; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9; *Chicago v. Trotter*, 136 Ill. 430; *State Centre v. Barenstein*, 66 Iowa, 249.

This is not a case where the city government has general control of the subject matter of the ordinance and may impose such conditions as it pleases, as in *Commonwealth v. Ellis*, 158 Mass. 555, *Commonwealth v. Mulhall*, 162 Mass. 496, and similar cases. The power of the city of Chelsea to deal with this subject is only what is given by R. L. c. 104, § 1; and the city authorities can in no respect transcend the authority thus given. *Commonwealth v. Turner*, 1 Cush. 493; *State v. Schuchardt*, 42 La. Ann. 49. We need not doubt the power of the Legislature to establish such regulations as this, or to delegate that power to city governments or other boards if it desires to do so, and to make licenses or permits from an administrative officer necessary to the exercise of trades or kinds of business that might involve a public danger. Many cases to this effect have been already referred to. See also *Commonwealth v. Page*, 155 Mass. 227, 230; *Commonwealth v. Abrahams*, 156 Mass. 57, 60; *Commonwealth v. Roswell*, 173

Left entirely to
his discretion

not required
of fire
department
(in case of fire)

Mass. 119; *Attorney General v. Williams*, 174 Mass. 476, 478; *Brodine v. Revere*, 182 Mass. 598; *Sprague v. Minon*, 195 Mass. 581; *Commonwealth v. Kingsbury*, 199 Mass. 542. But as has been already pointed out, the effect of the enforcement of this ordinance by the chief of the fire department may be wholly to prohibit the carrying on of the specified business in Chelsea. It is practically for him and not for the board of control to make such rules and regulations to be observed by any to whom he may choose to give permits as he may think proper; and so far as he may make compliance with his regulations a condition precedent to the issue of a permit, his power is absolute. These are legislative functions. And as was said in *Cooley on Constitutional Limitations* (7th ed.), 293, a "very important limitation which rests upon municipal powers is that they shall be executed by the municipality itself, or by such agencies or officers as the statute has pointed out. So far as the functions are legislative, they rest in the discretion and judgment of the municipal body entrusted with them, and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates or of any other authority." *State v. Paterson*, 5 Vroom, 163, 168; *Lyon v. Jerome*, 26 Wend. 485; *Brooklyn v. Nodine*, 26 Hun, 512; *East St. Louis v. Wehrung*, 50 Ill. 28; *Kinmundy v. Mahan*, 72 Ill. 462; *Ruggles v. Collier*, 43 Mo. 353.

The general principle also has been affirmed that, at any rate in the absence of a clear expression of the legislative will, an ordinance which attempts to vest in a city council or a board of control or some administrative officer of the municipality the power, not subject to review by the courts or by other higher authority, to permit or refuse to permit the carrying on of a business lawful in itself and not prohibited by legislation, is not to be sustained. It was said by Brown, J., in *Austin v. Tennessee*, 179 U. S. 343: "Although it was held in *Barbier v. Connolly*, 113 U. S. 27, and *Soon Hing v. Crowley*, 113 U. S. 703, that a municipal ordinance prohibiting laundry work within certain territorial limits and within certain hours was purely a police regulation, such an ordinance was void, if it conferred upon the municipal authorities arbitrary power at their own will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places without regard to the competency of the persons applying, or the propriety of the place selected for carrying on business." And see to the same effect *Gundling v. Chicago*, 177 U. S. 183; *Plessy v. Ferguson*, 163 U. S. 537, 550; *Yick Wo v. Hopkins*, 118 U. S. 356; *Mayor & City Council of Baltimore v. Radecke*, 49 Md. 217; *Richmond v. Dudley*, 129 Ind. 112; *Moneyweight Scale Co. v. McBride*, 199 Mass. 503, 514. The pursuit of a lawful business, not in itself harmful, though it may be regulated, is not, without legislative sanction, wholly to be stopped by municipal ordinances for the prevention of fire or for safeguard against some other apprehended danger. *Belmont v. New England Brick Co.*, 190 Mass. 442; *Commonwealth v. Rawson*, 183 Mass. 491, 494; *Belcher v. Farrar*, 8 Allen, 325, 328;

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Austin v. Murray, 16 Pick. 121, 126; *Commissioners of Northern Liberties v. Northern Liberties Gas Co.*, 12 Penn. St. 318; *Montgomery v. West*, 9 L. R. A. (N. S.) 659, and note. And see *Wineburgh Advertising Co. v. Murphy*, 195 N. Y. 126.

Accordingly, in our opinion, that part of c. 30, § 64, of the City Ordinances of Chelsea which forbids the use of any building for the picking, sorting or storage of rags without a permit in writing from the chief of the fire department is invalid and void; and the first and second instructions requested by the defendant should have been given. This conclusion makes it unnecessary to consider whether the evidence offered by the defendant should have been admitted, either to the court or to the jury.

In accordance with the terms of the report a verdict of not guilty must be entered.

So ordered.

SECTION III. — Police Power.

RAILROAD COMPANY v. RICHMOND.

1877. 96 U. S. 521.

THE Richmond, Fredericksburg and Potomac Railroad Company maintained a line of railroad on Broad Street in Richmond. The city council thereafter passed an ordinance to the effect that no car, engine, carriage, or other vehicle of any kind belonging to or used by said road should be drawn or propelled by steam upon that part of their track on Broad Street east of Belvidere Street. This action was brought to recover a penalty for violation of the ordinance.¹

WAITE, C. J. . . . It remains only to consider whether the ordinance complained of is a legitimate exercise of the power of a city government. It certainly comes within the express authority conferred by the amendment to the city charter adopted in 1870; and that, in our opinion, is no more than existed by implication before. The power to govern implies the power to ordain and establish suitable police regulations; and that, it has often been decided, authorizes municipal corporations to prohibit the use of locomotives in the public streets, when such action does not interfere with vested rights. *Donnahey v. The State*, 8 Smed. & M. Miss. 649; *Whitson v. The City of Franklin*, 34 Ind. 392.

Such prohibitions clearly rest upon the maxim *sic utere tuo ut alienum non ledas*, which lies at the foundation of the police power; and it was not seriously contended upon the argument that they did not come within the legitimate scope of municipal government, in the absence of

¹ This short statement is substituted for that of the Reporter. Arguments and part of the opinion are omitted.—Ed.

7 cases.

74 appeal for state

Only prohibiting use of steam trains on streets

Express auth also implied police power

legislative restriction upon the powers of the municipality to that effect. It is not for us to determine in this case whether the power has been judiciously exercised. Our duty is at an end if we find that it exists. The judgment of the court below is final as to the reasonableness of the action of the council. . . .

Affirmed.

DUFFIELD v. WILLIAMSPORT SCHOOL DISTRICT. 75

1894. 162 Pa. 476.

WILLIAMS, J.¹ The plaintiff seeks to compel by a writ of *mandamus* the admission of his minor son to the common school of the city of Williamsport. The board of school directors admits that the child is of proper age, is in good health, and possesses the qualifications that are enumerated in the general school laws as those that entitle him to admission. They allege however that he is excluded because of non-compliance with a regulation adopted in the exercise of a proper measure of care for the public health. The facts appearing in the answer are substantially as follows:

First. That the city of Williamsport provided by an ordinance adopted in 1872 and still in full force that no pupil "shall be permitted to attend any public or private school in said city without a certificate of a practicing physician that such pupil has been subjected to the process of vaccination." Second. That smallpox now exists in Williamsport and "is and has been epidemic in many near by cities and towns." Third. That in view of this situation the attention of the school board was drawn to the subject by a communication from the board of health requesting them to take action "to the effect that no pupil shall attend the schools of this city except they be vaccinated or furnish a certificate from a physician that such vaccination has been performed." Fourth. That upon considering this communication "and from the general alarm prevailing in the city over the report that a case of smallpox was in the city" they adopted a resolution in conformity with the recommendation of the board of health. Fifth. That this resolution is not enforced against those not at present in a condition to undergo vaccination; and as to those unable to bear the expense, the board provide vaccination without charge.

The plaintiff demurred to this answer, and the questions thus raised are over the power of the school board to adopt reasonable health regulations for the benefit of their pupils and the general public, and over the reasonableness of the particular regulation complained of in this case. It should be borne in mind that there is no effort to compel vaccination. The school board do not claim that they can compel the plaintiff to vaccinate his son. They claim only the right to exclude

¹ Arguments omitted. — Ed.

Ord. provided
that
no child
shall be
admitted
to school
unless
vaccinated

from the schools those who do not comply with such regulations of the city and the board of directors as have been thought necessary to preserve the public health. It would not be doubted that the directors would have the right to close the schools temporarily during the prevalence of any serious disease of an infectious or contagious character. This would be a refusal of admission to all the children of the district. They might limit the exclusion to children from infected neighborhoods, or families in which one or more of the members was suffering from the disease. For the same reason they may exclude such children as decline to comply with requirements looking to prevention of the spread of contagion, provided these requirements are not positively unreasonable in their character.

Is the regulation now under consideration a reasonable one? That is to be judged of in the first instance by the city authorities and the school board. It is only in the case of an abuse of discretionary powers that the court will undertake to supervise official discretion. Vaccination may be, or may not be, a preventive of smallpox. That is a question about which medical men differ and which the law affords no means of determining in a summary manner. A decided majority of the medical profession believe in its efficacy. The municipal regulations of many, and I have no doubt of most, of the cities of this state and country, provide for it. In the present state of medical knowledge and public opinion upon this subject it would be impossible for a court to deny that there is reason for believing in the importance of vaccination as a means of protection from the scourge of smallpox. The question is not one of science in a case like the present. We are not required to determine judicially whether the public belief in the efficacy of vaccination is absolutely right or not. We are to consider what is reasonable in view of the present state of medical knowledge and the concurring opinions of the various boards and officers charged with the care of the public health. The answers of the city and the school board show the belief of the proper authorities to be that a proper regard for the public health and for the children in the public schools, requires the adoption of the regulation complained of. They are doing, in the utmost good faith, what they believe it is their duty to do; and though the plaintiff might be able to demonstrate by the highest scientific tests that they are mistaken in this respect, that would not be enough. It is not an error in judgment, or a mistake upon some abstruse question of medical science, but an abuse of discretionary power, that justifies the courts in interfering with the conduct of the school board or setting aside its action. It is conceded that the board might rightfully exclude the plaintiff's son if he was actually sick with, or was just recovering from, the smallpox. Though he might not be affected by it, yet if another member of the same family was, the right to exclude him, notwithstanding he might be in perfect health, would be conceded. How far shall this right to exclude one for the good of many be carried? That is a question addressed to the official discre-

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Reas.

Rule

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tion of the proper officers; and when that discretion is honestly and impartially exercised the courts will not interfere.

The learned judge of the court below reached a correct conclusion in this case, and his decree is now affirmed at the cost of the appellant.

STATE v. JOHNSON.

1894. 114 N. C. 846.

76

CRIMINAL action, tried before *Boykin, J.*, at spring term, 1893, of FORSYTH Superior Court on appeal from the judgment of the Mayor of the city of Winston.

A jury trial was waived, and the facts agreed are as follows: Defendant was occupying and controlling a two-story wooden frame house with brick basement, situated in the city of Winston, within 1,000 feet of the Court Square, and about the 9th of December, 1892, the house was partially destroyed by fire; that on the 6th of January, 1893, the defendant made a contract with certain builders to have the house repaired at a cost of \$490; the original cost of the building, including brick basement, was about \$2,000. Shortly after work began under said contract the defendant was arrested, tried and convicted before the Mayor, and on appeal to the Superior Court the case was dismissed on motion to quash the warrant. About the 17th of March, 1893, the defendant, without the consent of the Board of Aldermen, placed said contractors at work again on the building, and he was again arrested and tried before the Mayor and fined, and he appealed from the judgment to the Superior Court. The following ordinances relating to this matter were adopted by said Board: "That for the protection of the city against fire the following ordinances be enacted under chapter 5, as sections 36 and 37 of said chapter 5 of the ordinances of the city: Section 36. That the fire limit shall be the territory from the center of Court Square, extending one thousand feet in each direction; that it shall be unlawful without the consent of the Board for any person or corporation to erect, alter or repair any wooden building within said fire limit, and any person or corporation violating the same shall be fined fifty dollars; that for each day such person or corporation continues to erect, alter or repair such building it shall constitute a separate violation of the ordinance, etc. Sec. 37. That any person who shall assist in constructing or repairing any building prohibited in above section shall be fined," etc.

There were other sections of the ordinances prohibiting the erection of wooden buildings in the business portion of the city without the written consent of the aldermen, etc., and the fire limit, 1,000 feet from the Court Square, was established, etc.

The defendant appealed from the judgment.

AVERY, J. Municipal corporations are the creatures of the Legislature, and their powers may be curtailed, enlarged or withdrawn at the will of the creator, whose control over them is limited only by the restriction that no statute will be enforced which impairs the obligation of a contract, interferes with vested rights, or is in conflict with any provision of the organic law of the State or nation. It is too well settled to recapitulate, or even justify discussion, that towns certainly by virtue of an express grant of authority to do so, and according to most authorities by implication arising out of the general welfare clause, if there is no general law to the contrary, are empowered to prescribe a fire limit and forbid the erection of wooden buildings within such bounds as they may by ordinance prescribe. 15 Am. and Eng. Enc., 1170; 1 Dillon Mun. Corp., section 405; Horr & Bemis Mun. Ord., section 222; *Keilinger v. Bickel*, 117 Pa. St. 326. The weight of authority seems to be also in favor of the proposition that the Legislature has the power to prevent the erection of wooden buildings in such corporations, or to delegate to the municipalities the authority to do so, even where the enforcement of the law or ordinance causes a suspension of work in the erection of structures of this kind by persons who are carrying out contracts for their erection made previously with the owners of the land, *Cordon v. Miller*, 11 Mich. 581; *Ex parte Fiske*, 17 Cal. 125. Persons, in contemplation of law, contract with reference to the existence and possible exercise of this authority when it is vested in the municipality. *Salem v. Magness*, 123 Mass. 574; *Munn v. Illinois*, 94 U. S. 113; *Woodlawn Cemetery v. Everett*, 118 Mass. 354; *Commissioners v. Intoxicating Liquors*, 115 Mass. 153. Upon this same principle all agreements for building are deemed to be entered into in view of the contingency that such power may be granted by the Legislature (when it has not already been delegated) while the contract is still *in fieri*. 15 Am. and Eng. Enc., 1171.

Towns have power
 by express grant
 & by gen. welfare clause

While it might be unreasonable to prohibit even the slightest repairs to wooden buildings standing within the fire limits prior to the passage of a statute or ordinance establishing such limits, the power to prevent repairs is delegated and presumably exercised for the protection of property, and where a wooden structure within the bounds is partially destroyed by fire already it is not unreasonable to require a new roof to be made of material less liable to combustion, or to forbid the repairs altogether when the damage to the building is serious, and to that end to compel the owners to give notice to the town authorities of their purpose to repair, and of the character of the contemplated work. *Village of Lewisville v. Webster*, 108 Ill., 414.

Can prevent

We are aware that there is much conflict of authority as to the reasonableness of ordinances forbidding all repairs or the enforcement of them so as to prevent replacing roofs with the same material used before their destruction. Horr & Bemis, section 223 (214); *Brady v. Insurance Co.*, 11 Mich. 425; *Ex parte Fiske, supra*. But in this particular instance the Legislature has granted a municipality the power

to supervise or prevent the replacing of the roof with another of shingles instead of constructing one of material less liable to destruction, and we are not prepared to question its authority to do so, since, upon the principle already announced, persons contracting with reference to the chances of the granting as well as the exercise of such powers acquire no vested rights, and afterwards voluntarily incurring all of the risks incident to their situation, have no reason to complain of the loss when it befalls them.

The Court imposed a fine of fifty dollars. There was no attempt to enforce the portion of the ordinance imposing a penalty of ten dollars for every hour the building was permitted to remain. There may be more doubt as to the reasonableness of that provision. *Commissioners v. Wilkins*, 121 Mass. 356. But it is not necessary to pass upon a question not fairly raised, and we forbear to do so. The judgment is *Affirmed.*

NORFOLK v. FLYNN.

1903. 101 Va. 478.

KEITH, P. The police justice of the city of Norfolk issued a warrant against Joseph E. Flynn for violation of an ordinance creating the office of milk inspector, defining his duties, and regulating the sale of milk in the city of Norfolk. The police justice entered a judgment against Flynn, from which an appeal was taken to the Circuit Court of the city of Norfolk, where it was reversed, and the case is now before us upon a writ of error to the judgment of that court.

The ordinance in question prohibits the sale of impure, diluted, or unwholesome milk, prescribes a test of what constitutes pure milk, creates the office of milk inspector, prescribes his duties, requires him to make frequent inspection and analysis of the milk sold in the city, and directs him to report all violations of the ordinance to the Board of Health.

By section 344, c. 43, of the Norfolk City Code, it is provided that "every person who conveys milk in carriages or otherwise for the purpose of selling the same, and those who sell or offer it for sale in a store, booth, stand or market place in the city of Norfolk, shall register annually in the books of said inspector, on the first day of May of each year, or within thirty days thereafter, and be licensed by said inspector to sell milk within the limits of the city for one year. Before said license is granted the applicant shall be required to pay fifty cents per cow, if he keeps cows, and two dollars for each stand or depot, if he has a stand or depot, for the sale of milk. The amount so collected shall be used exclusively for the purpose of paying the salary and expenses of said inspector. And whoever neglects so to register or vio-

lates any of the provisions of this section shall be punished for each offence by a fine of not less than five nor more than twenty dollars. The inspector shall pay over monthly to the treasurer of the city all sums collected by him."

Defendant contends that this section is invalid because, first, no ordinance of the city of Norfolk can have the force of law beyond the corporate limits of the city; and, secondly, because it is in violation of an act approved March 3, 1896 (Acts 1895-'96, p. 685, c. 625), which is as follows: "It shall be unlawful for any city or town of this State, or of any agent or officer of any such city or town, to impose or collect any tax, fine or other penalty upon any person selling their farm and domestic products within the limits of any such town or city outside of and not within the regular market-houses and sheds of such cities and towns."

2 ques.

The police power of the State, so far as it is necessary to protect the health of its inhabitants, has been delegated to the city of Norfolk. The general nature, character, and extent of the police power has been so recently investigated by this court that we deem it unnecessary to do more than refer to the cases. *Town of Farmville v. Walker*, 43 S. E. 558, 101 Va. 323, *City of Danville v. Hatcher* (just decided by this court); 101 Va. 523, 44 S. E. 723.

It is manifest upon the face of the ordinance in question that it was passed in the exercise of the police power of the city, and that its sole object was to secure to the people of Norfolk pure and unadulterated milk. It is a matter of common knowledge that milk is a necessary food of the sick and of the infirm, of the old and of the young; that through the agency of impure milk the germs of many diseases are disseminated; and even where there is the absence of any deleterious impurity or the germs of specific diseases, adulterated or diluted milk is not wholesome and nutritious, and its sale in its least injurious aspect is a fraud upon the community. Against such practices it is the duty of the constituted authorities to protect the communities under their control. The ordinance in question is not extra-territorial in its effect. It is not intended to operate beyond the limits of the city of Norfolk. It only touches those who come within the limits of the city to dispose of their milk.

1) ord. within p.p.

Ord. not extra-territorial

This subject was considered in the case of *State v. Nelson*, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. Rep. 399. In that case the objection was made "that the provisions of the ordinance are not within the limits prescribed for it by the statute, for the reason that it is attempted to make its operation extra-territorial, in that it provides for the inspection of dairies and dairy herds outside the city limits. There is no merit in this point.

"The manifest purpose of the statute under which this ordinance was passed was to enable the City Council to adopt such reasonable police regulations as would prevent the sale of unwholesome milk within the city, and not merely to prevent the keeping of unhealthy

dairy herds within the city limits. It is a matter of common knowledge that much of the milk sold in a city is produced in dairies situated outside the city limits. Any police regulations that did not provide means for insuring the wholesomeness of milk thus brought into the city for sale and consumption would furnish very inadequate protection to the lives and health of its citizens. It is also a matter of common knowledge, as well as of proof in this case, that the wholesomeness of milk cannot always be determined by an examination of the milk itself. To determine if it does or does not contain germs of any contagious or infectious disease, it is necessary to inspect the animals which produce it. The inspection of dairies or dairy herds outside the city limits, provided for by this ordinance, applies only to those whose milk product it is proposed to sell in the city. The provisions of the ordinance in that regard go only so far as it is reasonably necessary to prevent the milk of diseased cows being sold within the city. This inspection is wholly voluntary on the part of the owner of the dairy or dairy herd. If he does not choose to submit to such inspection, the result merely is that he or the one to whom he furnishes milk cannot obtain a license to sell milk within the city. The ordinance has no extra-territorial operation, and there has been no attempt to give it any such effect. The only subject upon which it operates is the sale of milk within the city."

We do not think that there is any merit in the first contention.

The city of Norfolk has no power to impose any tax, fine, or penalty on persons selling their own farm and domestic products in contravention of the Act of Assembly of March, 1896, already quoted. The ordinance of the city under consideration does not, in our judgment, levy a tax or impose a fine or penalty within the purview of that act. We are of opinion that it was not the purpose of the Legislature in that act to impose any restriction upon the city in the exercise of the police power delegated to it for the protection of the health of its citizens; and, unless plainly required so to do, we should be indisposed to adopt a construction which would render the city powerless to protect the health of its citizens from the sale of impure or adulterated milk. The means adopted seem to us to be reasonable. It was necessary to the end in view that there should be an inspector, that he should have the power to take samples of the milk and have them analyzed, and his duties involved expenses which it was proper that those engaged in the sale of milk should bear. A license from the inspector was evidence to the community that they could with safety purchase milk from the dealer to whom it was issued. He who is licensed should not complain, because he derives a direct and important benefit from it, from which he is required to pay a reasonable compensation. The dealer discovered in improper practices in the effort to foist upon the community milk unfit for use has no right to complain if he has been detected in such practices. What the dealers are required to pay by the ordinance is not for purposes of revenue,

Provision for
inspection outside

city goes only so
far as is neces.

W.C. to be
sole

extra-territorial

along

prohibits tax

on farm products

within city.

not created by

act of p.

means

derives

benefit

and is not a tax, but is an inspection fee, designed as a compensation for the service rendered.

*Compensation
service rendered*

The Supreme Court of the United States is jealous to guard against any encroachment by the States upon the power of the Federal Government to regulate commerce, yet it has been held that fees for the sanitary examination of vessels under the quarantine laws of the States, though they may in some degree tend to regulate commerce with foreign nations and among the States, are a valid exercise of the police power.

In *Morgan Railroad Co. v. Board of Health of Louisiana*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237, the court, after discussing the quarantine laws of the State of Louisiana and their various charges for services rendered incident thereto, in answer to the claim that the sums thus exacted were in effect a tonnage tax, forbidden by the Constitution of the United States, and exclusively within the power of Congress to regulate, said: "In the present case we are of opinion that the fee complained of is not a tonnage tax; that, in fact, it is not a 'tax,' within the true meaning of that word as used in the Constitution, but is a compensation for a service rendered, as part of the quarantine system of all countries, to the vessel, which receives the certificate that declares it free from further quarantine requirements."

Paraphrasing the language of the court in that case, the city of Norfolk says to the dealer: If you appear free from objection, you are relieved by the officer's certificate of all responsibility on that subject. For this examination you must pay. The danger comes from you, and, though it may turn out in your case there is no danger, yet, as you belong to a class from which this kind of injury comes, you must pay for the examination which distinguishes you from others of that class.

We are of opinion that the ordinance under investigation does not, and was not designed to, act beyond the limits of the city of Norfolk, but operates only upon those who undertake to sell milk within the jurisdiction of the city.

We are of opinion that it is a reasonable exercise of the police power, and that the charges which it imposes are in no sense a tax, penalty, or fine, but fees for services rendered; and it is therefore not repugnant to the Act of Assembly relied upon by defendant in error.

The judgment of the Circuit Court must be reversed, and this court will enter such judgment as the Circuit Court should have entered.

Reversed.

PENNSYLVANIA RAILROAD COMPANY'S CASE. 78

1906. 213 Pa. 373.

Ord. requiring R.R. to operate safety gates.

BROWN, J. The question raised on this appeal is as to the power of the borough of North Braddock to pass an ordinance approved April 7, 1904, entitled "Ordinance No. 133, requiring The Pennsylvania Railroad Company to erect and maintain and operate safety gates at the point where the tracks of said railroad company cross Fourth street in the borough of North Braddock and imposing a penalty for any failure to comply with the provisions hereof." By the first section of the ordinance the appellant is required within sixty days from its approval to erect, maintain and operate safety gates at the point designated in the title, for the warning and protection of those traveling upon Fourth street. By the second section a penalty is provided for failure to comply with the requirement of the first.

It is to be first observed, as is very properly stated by counsel for appellant, that the question is not, (a) Whether the borough may itself erect and maintain gates; (b) nor whether a given crossing ought to be protected by gates; (c) nor whether in a given case, a railroad company might be found guilty of negligence in failing to have gates; (d) nor whether the law ought to compel railroad companies to maintain gates. It is as to the power of a borough to require a railroad company to do a particular thing, which, in the judgment of the borough, the company ought to do at a particular point for the safety of the public in connection with the operation of its road. In the present case the question is as to the power of this borough to require the Pennsylvania Railroad Company to adopt what it regards as proper means for the protection of the public at a designated point crossed by the tracks of the company. It is not pretended that the tracks are not lawfully on the street, nor that the railroad company has not the right to run its cars over them.

In the operation of its road and in the running of its cars the judgment of the board of directors of a railroad company, in the absence of statutory provision, is supreme and exclusive. The public safety imperatively requires that there be no division of this great responsibility with others — not even with municipalities through whose limits railroads may run — for division of it would be the shifting of it in every case of accountability for failure to properly operate the road or run the cars. But, while this is true, corresponding duties of the highest order are imposed exclusively upon those having the control and management of railroads. One of these is to adopt and use suitable and adequate means to give notice of approaching trains at grade crossings, which are always more or less dangerous, and the failure to perform this duty is negligence, for the consequences of which those are responsible upon whom the duty is imposed. What particular means, however, shall be employed to protect the public when using streets or

highways at railroad crossings is left to the company operating the road, the law merely demanding and requiring reasonable care in view of all the circumstances. There is no common-law duty on the part of the company to station a flagman or erect gates at a crossing; but the failure of the company to do so is to be considered with other facts in every given case in determining whether the company was negligent. Among our cases announcing this rule are: *Philadelphia & Reading R. R. Co. v. Killips*, 88 Pa. 405; *Lehigh Valley R. R. Co. v. Brandtmaier*, 113 Pa. 610; *Seifred v. Penna. R. R. Co.*, 206 Pa. 399.

What is attempted by the appellee in the present case? Having no voice in the operation of the appellant's road, it undertakes to do what the common law itself does not do. It assumes to declare how the railroad shall perform a public duty at a particular point, and would substitute its judgment for that of the board of directors as to what kind of protection shall be afforded at the grade crossing, but with no corresponding responsibility resting on it for the inadequacy of the means which it declares must be adopted. If it has power to require the appellant to erect safety gates, it has the power to require the adoption, from time to time, of such other means as in its judgment ought to be adopted by the company for the protection of the public at street crossings. The power for which it contends would be practically unlimited.

That the appellee is attempting to substitute municipal control for that of the railroad company itself at a particular point by declaring just how the duty of the company must be there performed, is too plain for discussion. If the borough, in its judgment, ought itself to adopt means for the protection of the traveling public at this or any other point within the municipal limits, there is nothing to prevent it from doing so; but, before it can interfere, as it would by this ordinance, with the railroad company in its performance of its duty to protect the public at the crossing, it must show authority from the legislature to do so, expressly or impliedly conferred. The power which it would exercise may be a desirable one, but courts cannot recognize it unless it exists.

Municipal corporations possess and can exercise such powers only as are granted in express words, or are necessarily or fairly implied in or incident to those expressly granted, or those which are indispensable to the declared objects and purposes of the municipality: 1 Dillon on Municipal Corp (4th ed.), sec. 89; 20 Am. & Eng. Encyc. of Law (2d ed.), page 1139. Doubt as to corporate power is resolved against its existence, and this is no less true of a municipality than of a private corporation, for the source of the power of each is the same. Answer may be made to this that a municipality, as the representative of the state, has imparted to it inherent police power. This is true, and it is contended that the appellee is but exercising such power; but the distinction is overlooked that it is not itself, at the expense of the public, undertaking to exercise control over the streets and to protect the public at the railroad crossing, but is attempting to require some one else to do

City of
incorporated
corporation

Power must be
granted

Power

State

Can't require
R.R. to pay
to bear expense
unless it is
shown.

so at its own expense. It has undoubted power to do the former if it will, but, to do the latter through the ordinance which it has passed, authority to enact the same must appear. The use of the street in crossing it is a public use of it by the railroad company having a legislative right to so use it on an equality with any natural person, except as such right may be limited in the grant of it, and the attempted interference with this right must fail, unless the borough can point to its power to so interfere, expressly or impliedly existing.

Among the express powers conferred upon boroughs by the act of 1851, the one sought to be exercised here does not appear. By the first clause of the second section of that act borough authorities are empowered generally "to make such laws, ordinances, by-laws and regulations, not inconsistent with the laws of this commonwealth, as they shall deem necessary for the good order and government of the borough." In the succeeding twenty-five clauses of the same section are found the powers expressly conferred, but the power to pass this ordinance is not one of them. In *Borough of Millerstown v. Bell et al.*, 123 Pa. 151, this court, through PAXSON, J., said: "The general powers referred to in the first section must be confined to the particular subjects referred to in the succeeding sections." Without now committing ourselves to this, it is clear that the good order and government of a borough, referred to in the first clause, are not involved in the ordinance. The good order of a borough can be preserved and it can be properly governed, no matter how many railroads cross its streets by legislative permission, and no matter how fast cars may run over them. We assume this is the clause designated by the Superior Court as the "general welfare clause"—"broad enough," in the opinion of that court, "to cover the municipal legislation complained of." For the reason just given we cannot concur in this.

The case of *Commonwealth v. Philadelphia, Harrisburg & Pittsburg Railroad Co.*, 23 Pa. Superior Ct. 205, was relied upon by the Superior Court as authority to sustain the action of the lower court. In that case the Superior Court held that the three following cases were authority for the power of a borough to pass such an ordinance as is now under consideration: *Penna. R. R. Co. v. Duquesne Borough*, 46 Pa. 223; *Township of Newlin v. Davis*, 77 Pa. 317, and *Pennsylvania Railroad Co. v. Irwin*, 85 Pa. 336. An examination of these cases does not justify reference to them as authority for the power claimed by the appellee. In the first, the railroad company, which had become the owner of the canal, succeeded to the duty of maintaining a bridge over it. Having failed to perform that duty, it was held that the borough authorities, as the proper public officers to look after the public highways, had the right to repair the bridge and to recover the expense of doing so from the railroad company. In the second, the action was against a township for injuries resulting from a defective bridge. All that was decided was that it was the duty of the township to properly maintain it. In the third, the railroad company changed the location of a public

road, necessitating the building of a bridge, and it was simply decided that, the company having failed to rebuild and repair the bridge, the township could recover the cost of doing so from the company. A fourth case cited by the Superior Court, in *Commonwealth v. Philadelphia, Harrisburg & Pittsburg Railroad Co.*, is *Pennsylvania Co. v. Watson*, 81* Pa. 293. The reference was intended to be to another case reported in the same volume — *Pennsylvania Co. v. James*, 81* Pa. 194 — in which there appears the language quoted in the opinion of the Superior Court as to the police powers of boroughs. But, turning to the charge of the court below, as found on page 198, it appears that power had been conferred by the legislature to pass the ordinance which was under consideration. The legislature might, of course, have done so here, but it has not. By the Act of March 7, 1901, P. L. 20, cities of the second class are authorized to enact ordinances requiring the erection of safety gates and the placing of flagmen at the intersection of railroads with public streets, and by the Act of May 23, 1889, P. L. 277, the same authority is conferred upon cities of the third class.

As a borough of North Braddock ~~had no power to pass~~ the ordinance complained of it is declared to be invalid, and the order of the Superior Court, affirming the order of the court below sustaining it, is reversed, the costs below and on both appeals to be paid by the appellee.

PEOPLE EX. REL. WINEBURGH v. MURPHY. 79

1909. 195 N. Y. 126.

CHASE, J. The relator is a domestic corporation engaged in the business of constructing and maintaining advertising signs and displaying thereon advertisements pursuant to contracts with advertisers.

On June 15, 1908, the relator duly filed an application for a permit to erect a sky sign on the top of a building at 27 East Twenty-second street, in the city of New York, and such application was accompanied by a plan thereof in detail, and also with the consent of the owner of the real property on which it was proposed to erect the sign. From such application and the accompanying papers it appears that the building upon which it is proposed to erect the sign is an office building ten stories in height, and that it is proposed to erect the sign in compliance with the ordinances and regulations of the city of New York except that the proposed sign is more than nine feet in height above the front wall or cornice of the building. The proposed sign would be five feet six inches above the roof and the top thereof would be twenty feet six inches above said front wall or cornice. It is proposed to erect said sign between forty and fifty feet back from the building line on Twenty-Second street and to face it northwest and substantially in the direction

Δ refused to
issue permit for
sign over 9 ft.

Δ refused to
compel issuance
of permit.

of the rear of the building. It is intended for the display of advertisements to be seen from points in the city northwest of said building. The defendant refused to approve the specifications, plans and application or to issue a permit for the erection of said sign, solely because of an ordinance of said city limiting the height of sky signs to nine feet above the front wall or cornice of the building on which it is to be erected. The application was then made for a peremptory writ of *mandamus* to compel the issuing of such permit. The motion being denied an appeal was taken to the Appellate Division where the order was not only reversed but a writ was granted commanding the defendant "to examine the plan and application filed by the relator and described in its petition with reference to the material to be used and the method of construction thereof and as to the safety thereof, and if he shall find that the said structure is to be built of proper materials and in a proper manner and that the proposed structure is safe and secure, then to approve said application and issue a permit thereon."

The consent of the owner of said real property is based upon a substantial consideration paid to her therefor and the relator has entered into a contract with an advertiser for the use of such sign, the consideration for which is also a substantial sum.

It is not open to controversy that if the relator is not allowed to erect and maintain such sign the owner of said building and the relator as her lessee is deprived of some rights in the beneficial use and free enjoyment of private property without direct compensation.

Ord.

The ordinance of the city of New York to be construed on this appeal defines a sky sign and as so defined it is: "Any letter, word, model, sign, device or representation in the nature of an advertisement, announcement or direction supported or attached, wholly or in part over or above any wall, building or structure shall be deemed to be a 'sky sign.'"

The ordinance (section 144 of the Building Code of the city of New York) also provides as follows: "Sky signs shall be constructed entirely of metal, including the uprights, supports and braces for same, and shall not be at any point over nine feet above the front wall or cornice of the building or structure to which they are attached or by which they are supported."

All fences, signs, billboards and sky signs shall be erected entirely within the building line and be properly secured, supported and braced and shall be so constructed as not to be or become dangerous. Before the erection of any fence, sign, billboard or sky sign shall have been commenced a permit (for) the erection of the same shall be obtained from the Superintendent of Buildings having jurisdiction as provided in part 2, section 4 of this Code. Each application for the erection of any fence, sign, billboard or sky sign shall be accompanied by a written consent of the owner or owners or the lessee or lessees of the property upon which it is to be erected."

It is not the erection over and above any wall, building or structure

that is prohibited, but the thing constructed plus the letter, word, model, sign, device or representation in the nature of an advertisement, announcement or direction painted or pasted thereon or attached thereto.

*Ord. ...
sign in nature
of advertisement*

So far as appears there is no absolute limitation upon the height that tanks, towers or chimneys can be erected, nor as to flagpoles, balustrades, finials or other structures ornamental or useful. If it appeared in the relator's application that the structure proposed to be erected was not for the purpose of advertising, but for any other purpose, fancy or whim, it would not come within the prohibitive clause of the ordinance. A further examination of the ordinance shows that it relates wholly to erections within the building line and upon private property. It is in no way affected by the rules of law relating to street or municipal property. As private property the owner of the building on which it is proposed to erect the structure can use it in any way that to her may seem desirable, except as such use is subject to the implied obligation resting upon every owner of property to use it so as not to interfere with the rights of others, and also subject to such restrictions as are necessary for the public welfare.

The police power, so difficult to define, but so frequently invoked, is confined to such reasonable restrictions and prohibitions as are necessary to guard public health, morals and safety, and to conserve public peace, order and the general welfare. Regulations and ordinances within such general definition are valid. The city may make and enforce such regulations and ordinances, although they interfere with and restrict the use of private property. Compensation for such interference with and restriction in the use of property is found in the share that the owner enjoys in the common benefit secured to all.

Does the ordinance, so far as it relates to sky signs, come within the police power, or is its purpose simply to prevent or restrict a lawful business which it is alleged has been extended until it has become offensive to good taste?

Qa.

It is not asserted by the city that a sky sign, as defined in the ordinance or as proposed by the relator, has any relation whatever to or effect upon public health or public morals. The only alleged reason for the passage and enforcement of the ordinance is that a structure upon which advertisements are to be placed constitutes a danger by reason of the possibility of its falling into a public street. The danger, so far as it interferes with firemen in passing over the roof of a building, is apparently avoided in the case now before us by the provision that the structure on which the sign is to be erected will have a clear space of five feet and six inches between the roof and the bottom of the proposed structure. A structure nine feet in height would seem to be as great an interference with firemen in passing over the roof as one erected at a greater height.

*Only alleged
reason for ord.
danger to public*

An ordinance drawn to protect the public from physical danger should in terms bear some evidence of such purpose. So far as the

ordinance in question relates to sky signs, it is general in its terms and it is as prohibitive in remote parts of the city as in the congested parts thereof, and to a structure erected at a safe distance from any street or public place as one erected upon the front wall or cornice of a building situated upon the building line of a public way. The prohibited height is also based upon an arbitrary measurement above the front wall or cornice of the building, notwithstanding the height of the building at the place where it is proposed to erect the structure may be much less or more than at such front wall or cornice of the building. The prohibition is, therefore, not dependent upon the dangerous location of the structure nor is it based upon the height or safety of the particular thing constructed.

But the more serious objection to the ordinance is in the fact that the absolute prohibition is confined wholly to sky signs as they are defined therein. The physical danger to the public does not arise from the advertisements. The advertisement, announcement or direction bears no relation to the safety of the structure itself. It is not the structure, therefore, that is prohibited. Would a structure of any description be more dangerous if it bore the words "Omega Oil?" Could a city enact and enforce an ordinance limiting the height of all buildings therein which are painted a particular color and leave unrestricted the height to which a building could be erected so long as it was unpainted or painted a color other than the particular one specified? Such an ordinance would bear evidence in itself that it was not enacted for any purpose within the police power. It appears from the ordinance in question that it was not enacted in the interest of public health, morals or safety or to conserve public peace, order and general welfare, and the ordinance so far as it relates to sky signs is arbitrary and unauthorized.

This court in *City of Rochester v. West*, 164 N. Y. 510, sustained an ordinance forbidding the erection of billboards more than six feet in height without the consent of the common council. The court, referring to the charter of the city, say: "We think this statute conferred upon the common council of the city authority to regulate boards erected for the purpose of bill posting, so far, at least, as such regulation was necessary to the safety or welfare of the inhabitants of the city, or persons passing along its streets. . . . It is obvious that its purpose was to allow the common council to provide for the welfare and safety of the community in the municipality to which it applied. If the defendant's authority to erect billboards was wholly unlimited as to height and dimensions, they might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them." (p. 513.)

In *Commonwealth v. Boston Advertising Company*, 188 Mass. 348, the court held invalid an ordinance or regulation relating to signs, posters or advertisements, and say: "The plain and intended purpose of the rule is to prohibit the use of land near public parks and park-

Prohibition not
Based on ht. or
safety of building
sign.

Prohibition confined
to advertisements,
which bear no
relation to safety.

Ord. is not
valid.

ways for advertising. . . . Rules intended to prohibit advertisements of indecent or immoral tendencies, or signs dangerous to the physical safety of the public, no doubt would be reasonable within the meaning of the statute and valid. We think the case of *Rochester v. West*, 164 N. Y. 510, was decided and can rest only on this ground."

We quote from the head note in *Bryan v. City of Chester*, 212 Penn. 259, which fairly states the holding of the court as stated in the opinion as follows: "A municipality has no power to enact an ordinance forbidding citizens to erect billboards on their own property merely because such boards are unsightly or may create a nuisance. Any citizen against whom such an ordinance is sought to be enforced is entitled to the protection of a court of equity. Under the police powers of a municipality it may prohibit the erection of insecure billboards within its limits, prevent the exhibition from secure ones of immoral or indecent advertisements or pictures, and protect the community from any actual nuisance resulting from the use of them, but it can go no further. All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public, but a limitation without reason or necessity cannot be enforced."

In *Crawford v. City of Topeka*, 51 Kan. 756, the court, construing an ordinance that provided that no billboard or structure for advertising purposes should be erected unless at a certain distance from the line of the street, say: "The unreasonableness of the ordinance in question is easily seen when it is considered that the mere posting of a harmless paper upon a structure changes it from a lawful to an unlawful one. A person may erect a fence around his lot without violating the ordinance; but just as soon as an advertisement is posted or painted thereon it is brought within the condemnation of the ordinance, and the owner is liable to prosecution and punishment."

In *Bill Posting Sign Company v. Atlantic City*, 71 N. J. Law, 72, the court held that an ordinance forbidding the erection of signs upon private property in Atlantic City without regard to whether such signs may be dangerous to public safety is invalid, and in the opinion the court say: "The recognition of a power so wide would bestow upon the lawmaker the right to invest cities with authority to control the size and style of buildings which should be erected upon private property where the public safety was in no wise involved."

In *City of Passaic v. Patterson Bill Posting Advertising & Sign Painting Company*, 72 N. J. Law, 285, the court, referring to an ordinance, say: "The very fact that this ordinance is directed against signs and billboards only, and not against fences, indicates that some consideration other than the public safety led to its passage. It is obvious from the face of the ordinance that the object of the first section was not to secure the public safety; that section contains no reference to a dangerous condition of billboards, while the second section expressly undertakes to deal with those that become dangerous.

. . . Æsthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

In *City of Chicago v. Gunning System*, 214 Ill. 628, the court, in condemning an ordinance prohibiting certain billboards, say: "The purpose . . . seems to be mainly sentimental, and to prevent sights which may be offensive to the æsthetic sensibilities of certain individuals residing in or passing through the vicinity of the billboards."

A municipality, in enacting ordinances relating to the safety of the public, may undoubtedly make reasonable classifications among structures with reference to their location and the necessity or importance thereof without offending against the provisions of the fourteenth amendment of the Federal Constitution. The classification, as well as the ordinance itself, must be based upon some necessity justifying the exercise of the police power. It has been said that the police power of a municipality is allied to the right of self-preservation in an individual. In exercising such power or right, the purpose thereof, and the limitations thereon, should not be forgotten. The classification of the sky sign by the ordinance in question is dependent upon the letter, word, model, sign, device or representation in the nature of an advertisement, announcement or direction and it has no direct relation to the safety of the public. An ordinance which purports to legislate for public safety must tend in some appreciable way to that end. Unless there is a substantial connection between the assumed purpose of the ordinance and the end to be accomplished, such ordinance is unenforceable. *Matter of Jacobs*, 98 N. Y. 98; *People v. Orange Co. Road Cons. Co.*, 175 N. Y. 84; *People v. Gillson*, 109 N. Y. 389; *Health Department v. Rector, etc.*, 145 N. Y. 32; *People v. Ewer*, 141 N. Y. 129; *Fisher Co. v. Woods*, 187 N. Y. 90.

We think that the order of the Appellate Division was right, and that it should be affirmed, with costs.

HAIGHT, J. I concur for affirmance.

The ordinances of the city of New York pertaining to the height and manner of construction of fences, signs or billboards, whether upon the ground or housetops, are for the protection of the public from injury, and consequently, if reasonable, are valid under the police powers which the legislature has delegated to the board of aldermen. The only difficulty I find with reference to the ordinance pertaining to sky signs is with regard to the definition given thereof in the ordinance. It is that "any letter, word, model, sign, device or representation in the nature of an advertisement, announcement or direction supported or attached, wholly or in part over or above any wall, building or structure, shall be deemed a sky sign." If, therefore, the letter, word, model, sign or device is attached to any lawful structure upon the top of a building it would become a sky sign, and if over nine feet above the front wall or cornice of the building would come within the condemnation of the ordinance. It is not the letter, word, model, sign

or device that endangers the public safety, but it is the structure upon which such letter, word, model, sign or device is attached that may be dangerous. It would, therefore, be entirely proper and within the police powers of the municipality, through its board of aldermen, to enact an ordinance limiting the construction of fences, signs or billboards, either upon the ground or the housetops, to those that are safe, and to also designate the material and manner in which they shall be constructed and to limit the size or height thereof within reasonable bounds.

Order affirmed.

ROCHESTER v. MACAULEY-FIEN MILLING CO. 80

1910. 199 N. Y. 207.

THE common council of the city of Rochester duly enacted an ordinance regulating the emission of smoke from chimneys. The defendant is a domestic corporation operating and conducting a flour mill in said city. After the ordinance quoted became in force as a law of the city, and on November 2, 1906, the defendant continuously between 10:16 A. M. and 11:15 A. M. suffered and permitted the escape of smoke from a stationary smokestack on said flour mill, in violation of said ordinance.

*Ord. regulating
emission of smoke*

This action was commenced in the Municipal Court of the city of Rochester to recover of the defendant twenty-five dollars, the penalty for such disobedience of said ordinance. Judgment was recovered against the defendant, which has been affirmed by the County Court of the county of Monroe and the Appellate Division of the Supreme Court in the fourth judicial department respectively on appeals to such courts and an appeal is taken by permission from the judgment of the said Appellate Division of the Supreme Court to this court.¹

CHASE, J. At the time when this action was commenced Rochester was a city of the second class, governed by the Second Class Cities Law (Chapter 55 of the Laws of 1909), which, so far as we are now concerned, is a re-enactment of chapter 182 of the Laws of 1898. Said act of 1898 was in force when said ordinance was enacted. The common council of the city is vested with legislative power by a provision of the statute as follows: "The legislative power of the city is vested in the common council thereof, and it has authority to enact ordinances, not inconsistent with law, for the government of the city and the management of its business, for the preservation of good order, peace and health, for the safety and welfare of its inhabitants and the protection and security of their property. . . . (Second Class Cities Law, sec. 30; chap. 182, Laws of 1898, sec. 12.)"

Power

¹ Statement of facts abridged and arguments omitted. — ED.

This court in *People ex rel. Dunn v. Ham*, 166 N. Y. 477, in construing the section from which we have quoted, said: "The evident purpose of that section was to confer upon the common council entire legislative authority as to matters relating to the municipal government, except as limited by that statute and others not inconsistent with its provisions. This is clearly indicated by the act itself, and was plainly avowed by the commission which reported it to the legislature. (Senate Documents, 1896, Vol. 5, No. 24.)" (p. 481.)

The common council is thus the judge as to what ordinances it will pass for the safety and welfare of the inhabitants of the city and the protection and security of their property, and unless an ordinance passed by it is wholly arbitrary and unreasonable it should be upheld. The necessity and advisability of the ordinance is for the legislative power to determine. The presumption is in favor of the ordinance. (*Fifth Ave. Coach Co. v. City of New York*, 194 N. Y. 19.)

This court, referring to the police power in *People ex rel. Wineburgh Adv. Co. v. Murphy* 195 N. Y. 126, say: "The police power, so difficult to define, but so frequently invoked, is confined to such reasonable restrictions and prohibitions as are necessary to guard public health, morals and safety, and to conserve public peace, order and the general welfare. Regulations and ordinances within such general definition are valid. The city may make and enforce such regulations and ordinances, although they interfere with and restrict the use of private property. Compensation for such interference with and restriction in the use of property is found in the share that the owner enjoys in the common benefit secured to all." (p. 131.)

The emission of smoke from a chimney when it includes dust, soot and cinders to such an extent that it is rendered very dark or black must materially affect the purity of the atmosphere surrounding the place where it is so emitted. The pervading substances in the smoke necessarily darken its color in proportion with the amount thereof. As soon as the impelling force is removed such substances obey the law of gravity and fall upon the adjoining property. In a city or closely populated community where persons and property cannot be removed from the effects of the disagreeable contamination it not only pollutes the air that must be breathed, but it mars the appearance, destroys the cleanliness, and affects the value of the property within the circle upon which such substances from the smoke so fall. The extent of the injury is a matter to be established by evidence, to include all the facts and circumstances relating to it; although doubtless it is a matter of common knowledge of which the courts may take judicial notice that some injury must result from substance-laden smoke pervading the atmosphere in which persons and property necessarily remain.

The Court of Appeals of the District of Columbia, referring to smoke as a nuisance, say: "Now, whilst the emission of the ordinary smoke from the chimneys of houses does not amount to a nuisance *per se*, it is nevertheless a matter of common knowledge, not to be ignored by

Smoke affects
person & prop

the courts, that the emission of a volume of dense, black smoke from a single smokestack or chimney of a large furnace, may, under some circumstances, work physical discomfort to the general public coming within its circle of distribution upon public thoroughfares, and may possibly also work injury to public interests in other respects. Whenever it may become a special source of legal injury to an individual he will have an action of damages therefor, and, in cases of continuation, equity will afford complete relief by process of injunction." (*Moses v. U. S.*, 16 App. Cas. D. C. 428; 50 L. R. A. 532.)

The courts of this state have frequently exercised their restraining power against persons so using their property as to unreasonably interfere with the property and personal rights of others. (*McCarty v. Natural Carbonic Gas Co.*, 189 N. Y. 40; *Pritchard v. Edison Elec. Ill. Co.*, 179 N. Y. 364; *Bly v. Edison Elec. Ill. Co.*, 172 N. Y. 1; *Garvey v. Long Island R. R. Co.*, 159 N. Y. 323; *Morton v. Mayor, etc., of N. Y.*, 140 N. Y. 207; *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18; *Cogswell v. N. Y., N. H. & Hartford R. R. Co.*, 103 N. Y. 10; *Campbell v. Seaman*, 63 N. Y. 568; *Yocum v. Hotel St. George Co.*, 18 Abb. [N. C.] 340; *Beir v. Cooke*, 37 Hun, 38; *Hutchins v. Smith*, 68 Barb. 251.)

Ordinances relating to the emission of smoke have been enacted in nearly every city and village. There is a great difference in the smoke, dirt and soot-producing qualities of fuel and in the furnaces where consumed and in the manner of stoking the fires, and as the careless and unrestrained use of some fuels tends to produce and discharge into the atmosphere surrounding the places where such fuels are so carelessly used, dirt and soot-laden smoke that is disagreeable and injurious, the production and discharge of such smoke is a proper subject for reasonable police regulation. If an ordinance so enacted is reasonable, it should be upheld, and if unreasonable, it should be declared inoperative and void.

The Municipal Court by the judgment rendered in this case has, in substance, found that the ordinance is reasonable and enforceable. Such judgment was affirmed by the County Court and it has been unanimously affirmed by the Appellate Division. As a question of fact it is not open for our consideration. It is not unreasonable upon its face or as a matter of law. The judgment should be affirmed, with costs.

CULLEN, CH. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur.

Judgment affirmed.

*I of lower
st. final auto
reas.*

5 cases

SECTION IV. — *Power to Tax.*

GODDARD, PETITIONER.

1835. 16 Pick. 504.

81

PETITION for a *certiorari* to the Municipal Court for the City of Boston.¹

By law required land owners to clear side walks in front of their prop.

SHAW, C. J. No question is made of the facts in this case, but it is conceded, that the petitioner did not clear the side walk in front of his land, in the manner required by the by-law of the city, and he justifies this on the ground that the law itself is invalid and of no binding force. For the purpose of having this question deliberately considered, and for the purpose of taking several exceptions to the course of proceedings, the petitioner has prayed for a writ of *certiorari* to the Municipal Court.

By law not imposing tax which is unequal

Another, and perhaps the most important objection, is, that the by-law is one imposing a tax or duty upon the citizens, and it is a violation of the constitution in this, that it is partial, and unequal, and contravenes that fundamental maxim of our social system, that all burdens and taxes laid on the people for the public good shall be equal.

But the Court are all of opinion, that the by-law in question is not obnoxious to this objection.

Not tax, but police regulation

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It is not speaking strictly, to characterize this city ordinance as a law levying a tax, the direct or principal object of which is, the raising of revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid, not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description composing the class.

111

It is said to be unequal, because it singles out a particular class of citizens, to wit, the owners and occupiers of real estate, and imposes the duty exclusively upon them.

If this were an arbitrary selection of a class of citizens, without reference to their peculiar fitness and ability to perform the duty, the objection would have great weight, as for instance, if the expense of clearing the streets of snow were imposed upon the mechanics, or merchants, or any other distinct class of citizens, between whose

¹ Statement of facts, arguments, and part of opinion omitted.—En

convenience and accommodation, and the labor to be done, there is no natural relation. But suppose there is a class of citizens who will themselves commonly derive a benefit from the performance of some public duty, we can see no inequality in requiring that all those who will derive such benefit, shall by a general and equal law be required to do it. Supposing a by-law should require every inhabitant, who keeps a cart, truck or other team, or a coach or other carriage, to turn out himself or send a man, with one or more horses, after each heavy fall of snow, to assist in levelling it. Although other citizens would derive a benefit, yet as these derive some peculiar benefit, accompanied with the ability, I can at present perceive no valid objection to a by-law requiring it, on the ground of inequality. Supposing a general regulation, that at certain seasons of the year, every shop-keeper should sprinkle the side walk in front of his own shop, or sweep it, inasmuch as he has a peculiar benefit, and as the duty is equal upon all who come within the description, it seems to us to be equal, in the sense in which the law requires all such burdens to be equal. And it appears to us that the case before us is similar. Although the side walk is part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it, and benefit from it, distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit, often in accommodating his cellar-door and steps, a passage for fuel, and the passage to and from his own house to the street. To some purposes therefore it is denominated his side walk. For his own accommodation, he would have an interest in clearing the snow from his own door. The owners and occupiers of house-lots and other real estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community.

Besides, from their situation, they have power and ability to perform this duty, with the promptness which the benefit of the community requires, and the duty is divided, distributed and apportioned upon so large a number, that it can be done promptly and effectually, and without imposing a very severe burden upon any one. Supposing a by-law should require, what is often done, in practice, that upon an alarm of fire in the night, all householders, on streets leading to and near the fire, should exhibit a light. This would seem to be reasonable. Or that all the owners or occupiers of dwelling houses, having a well and pump, should keep them in repair at their own expense, to be used in case of fire. It would operate partially, but it seems to us not unequal, in the sense in which we are using that term. The city might keep persons ready in every street, to light torches and flambeaux in case of fire, and the expense be paid from the treasury; still it appears to me, that as householders would derive a benefit from the operation of this general regulation, as their local situation puts it peculiarly within their power and ability to perform it without great

Can require citizens deriving benefit to do public duty.

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benefit to community

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expense, and as it is equal in its terms, it would not be obnoxious to the charge of being invalid for partiality and inequality.

In all these cases the answer to the objection of partiality and inequality is, that the duty required is a duty upon the person in respect to the property which he holds, occupies and enjoys, under the protection and benefit of the laws, that it operates upon each and all in their turns, as they become owners or occupiers of such estates, and it ceases to be required of them, when they cease to be thus holders and occupiers of the estate, in respect to which the duty is required. In this respect it is like a land tax, or house tax, it does not bear upon owners of personal property, and therefore does not bear upon all citizens alike, but is not on that account unequal or partial, in the sense contemplated by the Declaration of Rights, requiring all taxes and burdens to be equal and impartial.

The Court are all of opinion, that as a by-law, the regulation in question was a reasonable one, that it was not repugnant to the constitution or laws of the Commonwealth, and that the conviction was right.

*Petition dismissed.*¹

CHICAGO GENERAL RAILWAY COMPANY v. CHICAGO. 82

1898. 176 Ill. 253.

WILKIN, J. This is an action of debt brought by the city of Chicago, against plaintiff in error, to recover damages on its bond in the sum of \$25,000. Damages were assessed at \$2250, and judgment rendered for that amount and costs, from which plaintiff in error prosecutes this writ.

The facts in the case are uncontroverted. In February, 1892, the city passed an ordinance granting to plaintiff in error authority to construct, maintain and operate a street railway on Twenty-second and other streets in the city, upon certain terms and conditions, among which was the following:

"Sec. 8. *Per mile tax.* — The rights, privileges and franchises herein conferred are granted upon the further condition and consideration that on or after December 1, 1895, the said company or their legal assigns, or any person, firm, company or corporation in any way claiming under or through them, or operating the road herein authorized, shall pay into the city treasury of the city of Chicago, annually, for each and every lineal mile of their track laid under the provisions of this ordinance, and a proportionate amount of any fraction of a mile laid as herein authorized, the sum of five hundred dollars (\$500.)" etc.

¹ See *Doughten v. Camden*, 72 N. J. L. 451, 63 Atl. 170, 11 Am. St. Rep. 680.

of gas pipes not subject

-170 HS45

inequality
duty required
land taxes

use a land tax
in this

St. Ry. Ord. required
payment of \$500 for
each mile of track

Section 11 required the company to give bond in the sum of \$25,000, conditioned for the faithful observance and performance of the conditions of the ordinance. Plaintiff in error accepted the ordinance, and in pursuance of its terms caused the bond sued on to be executed. Four and a half miles of track were laid by it, but it refused to pay the sum provided by section 8 when due, and thereupon this suit was brought.

" R_y refused to pay

The principal question to be determined in the case is, whether the city had the power to impose the condition prescribed in section 8 of the ordinance granting the right to the defendant railway company to occupy the street with its tracks.

On whether city had power to impose such condition

Our constitution (art. 11, sec. 4.) provides: "No law shall be passed by the General Assembly granting the right to construct and operate a street railway within any city . . . without requiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad." The twenty-fourth clause of section 1 of article 5 of the City and Village act (then in force) gave the city power "to permit, regulate or prohibit the locating, constructing or laying a track of any horse railroad in any street, alley or public place; but such permission shall not be for a longer time than twenty years." (Rev. Stat., p. 219.) Section 3 of the Horse and Dummy act provides that no company shall have the right to construct its road along any street or alley, etc., without the consent of the corporate authorities of such city, and that "such consent may be granted for any period not longer than twenty years, on the petition of the company, upon such terms and conditions, not inconsistent with the provisions of this act, as such corporate authorities or county board, as the case may be, shall deem for the best interest of the public." Rev. Stat., p. 571.

Const.

Stat.

It is not denied that the city had the power to impose a money condition as a license fee, or to protect it against liabilities and expenses occasioned by reason of the construction of the railroad in its streets, or for expenses and the like of defendant in error, but it is earnestly insisted that this ordinance shows an unlawful attempt on the part of the municipality to sell its license, and that it is also an unauthorized attempt to raise revenue for the purposes of municipal government; also, that, because the ordinance contains other terms and conditions for the protection of the city against loss or disbursements, such as a license fee of \$50 per annum for each car operated; there is no room for the presumption that the condition for the payment of this amount per mile was with a view to such purposes. We are unable to agree with counsel in these contentions. It was clearly within the power of the council, by its ordinance, to make this additional condition if it so desired, and the courts cannot indulge the presumption that the act was done for an illegal purpose, it being apparent that it could be done legally. It is not claimed the condition is unreasonable or against public policy, and therefore void. It is not for this court to review

lic m.?

" Tax?

It does not

the acts of the city council which are within its discretion and within the grant of power to it. *People v. Chicago West Division Ry. Co.* 118 Ill. 113.

*Mileage tax, and
even if it compensate
city for license.*

But if it were true, as contended by council, that the purpose of the mileage tax was to compensate the city for granting the privilege to the plaintiff in error to lay down its tracks and operate its street railway, it is still, in our opinion, a valid condition, and comes fully within the scope of the power granted to the city by section 3 of the Horse and Dummy act, *supra*. In *City of Providence v. Union Railway Co.*, 12 R. I. 473, it is said: "The defendant corporation also contends that it is not liable because the city had no power to exact a pecuniary compensation for the use of the streets. We do not think this defense is tenable. The charters of the horse railroad companies contain a provision that nothing in the charters shall be construed to allow the companies to construct, use or continue their roads into, over or through any street or highway of the city unless with the consent of the city council of said city, and upon such terms and conditions and under such rules and regulations as said city council may impose. The defendant cites certain cases which hold that a municipal corporation has no right, under a simple authority to license, to demand money for the license beyond a small fee for incidental expenses. The ground of decision of those cases is that the power to license is a mere police power, and therefore cannot be exercised with a view to revenue, unless conferred in terms which plainly authorize it. But the power here conferred is not a police power. Evidently it was conferred, not only for the general good, but also to enable the city to protect itself as the body charged with the maintenance and repair of the streets, and it is to be construed fairly in view of its purpose. Rails in streets are a serious annoyance. They divert travel to other streets, and so necessitate an increase of care and expense, not only where they are laid, but also in such other streets. It is therefore not unreasonable to require the companies to pay something for their privileges. The city, in giving its assent, has required it, and the companies, in accepting the assent, have agreed to comply with the requirements. We think the agreement binds them." The following cases, under statutes not materially different from ours, are to the same effect: *City of Allegheny v. Millroth*, 159 Pa. St. 411; *Federal Street Railway Co. v. Allegheny*, 14 Pittsb. L. J. (N. S.) 259; *Street Railway Co. v. Covington*, 9 Bush, 127.

Booth, in his work on Street Railways, (sec. 284,) deduces from the authorities the conclusion that the municipality has a right to exact a money consideration for its consent to the occupancy of its streets, and says: "The right to exact compensation in money, otherwise called a *bonus*, is justified on the ground that the right to use a street already graded, as a road-bed, is a valuable privilege, and because the occupation of the streets by cars interferes to some extent with their use by other travelers. Where the enjoyment of the franchise depends upon

the consent of the local authorities, their right to impose conditions authorizes them to exact the payment of a bonus." Judge Elliott, in his recent and able work on Railroads, (sec. 1081,) lays down substantially the same doctrine.

It is said the public, for the best interests of which the city council must act, is not the public within the limits of the city, but that by the term "public" is meant "the body of the people at large; the people of the neighborhood; the community at large, without reference to geographical limits," — citing *Baker v. Johnson*, 21 Mich. 319. We do not deem it important to here determine the meaning of the word "public," as used by the legislature. Certainly there is nothing shown in this record to justify the presumption that the city council used the word in a sense other than that placed upon it by the legislature.

It is again insisted that the condition embodied in section 8 of the ordinance is violative of the fourteenth amendment to the constitution of the United States, of section 2 of the bill of rights of the constitution of this State, and of section 22 of article 4 of the latter constitution. The position is, that each of these are violated because the railway company is, by the condition, denied the equal protection of the laws of its property without due process of law; that a general law may be made, applicable to all street railways in the city, but no special ordinance can be enacted; and it is insisted that because other ordinances have been adopted by the city granting privileges to other railway companies to occupy the streets without exacting this condition, the latter provision has been violated. We think, with counsel for the city, that the statute having given the municipality power to grant or withhold its consent as "it shall deem for the best interest of the public," — the power being discretionary, — it is manifestly not to be exercised by a general ordinance applicable alike to all cases, but each case must be acted upon with reference to its peculiar conditions and circumstances. If, in the exercise of its sound discretion, the city council shall determine that the best interests of the public do not require the imposition of any conditions whatever, it may grant its license without qualification; but if, on the other hand, the public interest requires that the occupancy of particular streets, under peculiar conditions, demands that certain exactions shall be made of the company for the privilege conferred, then the city council has a right to so provide, and no constitutional right or privilege is interfered with. There is no general law of the State of Illinois, nor is there an ordinance of the city of Chicago, requiring all street railway companies to pay a mileage tax, but, as we have before said, discretionary power is conferred by the legislature upon the city council to impose such a condition upon giving its consent to any particular company to occupy its streets.

We are also of the opinion that even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was *ultra vires*, the city not having the power

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to impose it, nevertheless, the ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is now estopped to deny. The act of the city in imposing the condition cannot be treated as against public policy or prohibited by statute, and void, and therefore, having accepted the contract in its entirety and enjoyed the benefits for which it agreed to pay the amount prescribed, it cannot now repudiate that contract. *Kadish v. Building Ass.*, 151 Ill. 531; *Cook County v. City of Chicago*, 158 id. 524; *City of Fulton v. Northern Illinois College*, id. 333.

License K

It is well settled in this State, that while the granting of authority to occupy the public streets of a city for other than the ordinary purposes of a street is, in the first instance, a mere license, still, when that license is granted upon conditions, and the licensee has accepted the privilege and performed the conditions, it becomes a contract between the parties. Here it must be admitted that the defendant could only occupy the streets of the city with its tracks by the consent of the municipal authorities. That consent could be given or withheld, as these authorities deemed proper; and upon such conditions as they considered for the best interests of the public they granted the privilege and named the conditions. The defendant accepted, without qualification. It has availed itself of the benefits of the contract and now seeks to repudiate the conditions. We are unable to see upon what principle, under the law of contracts, it can be allowed to do so. We think, however, that the liability of the defendant upon its bond may be properly placed upon the broad ground that the city council was vested with full power and authority to impose the condition and require the bond for its faithful performance.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

CHICAGO v. UNION TRACTION CO. 83

1902 199 Ill. 259.

Boogs, J.¹ The city of Chicago instituted an action before a justice of the peace against the defendant in error company to recover the fines provided by section 1717 of the revised code of ordinances of said city for the alleged violation of the provisions of section 1716 of the code. The traction company was adjudged guilty by the justice of the peace and a fine of \$100 was assessed against it. In the criminal court of Cook county, to which the traction company brought the cause by an appeal, judgment was entered finding the traction company not guilty. The city has sued out this writ of error to bring the record into this court for examination.

¹ Arguments omitted.—Ed.

The ordinances upon which the prosecution is based are as follows:

"1716. The several street railway companies at any time operating railroad tracks on and along the surface of any of the streets, avenues or alleys of the city of Chicago are hereby, respectively, required to remove all dirt, snow and other accumulations from so much of the surface of each street, avenue or alley now or hereafter containing any of their railway tracks, as lies between the two outermost rails of such tracks, and also from such additional surface, in width, as may be prescribed in any ordinance relating to or affecting any such street, avenue or alley, and shall, respectively, clean such portions of said street, avenue or alley and remove entirely from and out of such street, avenue or alley all such dirt, snow and accumulations at least once in each week, and as much oftener as the commissioner of public works shall, in writing, direct; such dirt, snow and accumulations to be removed and disposed of in accordance with the ordinances of the city in relation to the removal of street cleanings, and subject to the rules and regulations of the department of public works in that behalf.

*Street rep. required
to remove dirt &
snow for tracks.*

"1717. Any street railway company operating a street railway upon or along the surface of any street, avenue or alley in the city of Chicago which shall refuse or neglect to clean any part of a street, avenue or alley, as required by the last preceding section hereof, shall, upon conviction thereof, be fined in a sum not less than \$50 nor more than \$200 for each and every case of such refusal or neglect."

The alleged violation of the ordinance consisted in the refusal of the traction company to remove the dirt and other accumulations lying on the surface of the street between the two outermost rails of the track of its railway in Kinzie street. That the defendant in error company so refused and failed to obey the ordinance was conceded. The judgment of acquittal proceeded upon the view urged by the traction company that the ordinances were void.

The defendant in error company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and is engaged in the occupation and business of carrying passengers for hire in street cars propelled by electricity, and otherwise, in the city of Chicago. Its tracks were laid in Kinzie street by virtue of an ordinance adopted by the city council of the city on the 14th day of March, 1887, authorizing the North Chicago Street Railway Company, its successors and assigns, to construct and maintain a double track street railway in said Kinzie street and operate the same by electricity conveyed by overhead wires. The defendant in error company is the successor of the said North Chicago Street Railway Company. It has constructed and maintains a double track railway on Kinzie street, in the city of Chicago, from Market to State street, and operates its street cars thereon by electric power.

It was stipulated that ever since the first day of July, 1899, the said defendant, the Chicago Union Traction Company, has had possession and control of said street car tracks on Kinzie street, and has run

thereon street cars for the conveyance of passengers, operated by electric power only, by means of an overhead wire, and that during the week beginning Sunday, August 6, 1899, and ending Saturday, August 12, 1899, the said defendant did not remove, and refused, on demand, to remove, from the said street car tracks on Kinzie street the dirt and other accumulations lying on the surface of said street between the two outermost rails of said tracks, contrary to the form of said ordinance of April 8, 1897; that said Kinzie street is a public street in the city of Chicago, the fee title to the soil of which street is in the said city of Chicago for the use of the public as a street.

The sole question presented is, whether the city possessed power to adopt and enforce the ordinance. The position of counsel for the defendant in error company is that the ordinance is void, and that contention met the view of the criminal court.

There was testimony to the effect that the presence of the rails of a street railway track upon a street causes the dirt to accumulate in the portion of the street between the rails. The tendency is for dirt to gravitate towards the sides of the street when there are no rails to prevent it; that this tendency of dirt to gravitate toward the sides of the street is aided by the elements, and that little brooming is required to keep the center of streets clean if there are no rails upon them, but rails retain the dirt in the center of the street; that the presence of the tracks in Kinzie street added to the difficulty in cleaning the portion of the street outside the rails; that it took longer to clean an entire street with rails than it took to clean a street where their were none, — three times as long on the portion of Kinzie street in question; that Kinzie street was paved between the rails with granite and outside with cedar blocks, and has a flat crown between the rails and sloped from the outside rails to the gutter; that the dirt came from horse droppings, from excavation wagons, coal wagons and ordinary wear and tear; that street accumulations have an effect upon the general health, through dust, in two ways: one through the presence of irritating particles, which are injurious in this, as being irritants to the respiratory passages and the eyes, and also to the presence of pathogenic bacteria which are in and upon the particles of dust which are in the street. As to these points there was no countervailing proof.

It appeared from this testimony the health and comfort of the people required the dust and other accumulations should be removed from that portion of Kinzie street described in the ordinance. There is, it is conceded, a general police power possessed by the city by which the traction company and all persons, natural or artificial, may be subjected to such reasonable restrictions and regulations as are found to be proper and requisite to secure the health, comfort and convenience of the people. The ordinance, it is urged by counsel for the city, should be sustained as a legitimate exercise of the police power. It is insisted by the traction company it is the duty of the city to keep the streets of the city clean and in good repair; that the city has power to

raise funds for that purpose by general taxation, that the public interest is concerned in the matter of cleaning and repairing the streets, and that the execution of the power to raise the necessary funds to clean and repair the streets by general taxation is a duty devolving upon the city, and that it cannot lawfully lay the burden of the work of cleaning and repairing the portion of Kinzie street in question on the traction company, as is proposed to be done by this ordinance; that the ordinance is void for the reason it casts a public burden upon the traction company and discriminates against the traction company, and is a perversion of the police power.

It is clear the city could not, by virtue of the police power or otherwise, require the defendant in error company to clean and repair the street if the real purpose is merely to shift the public burden from itself to the company. In *Gridley v. City of Bloomington*, 88 Ill. 554, we held invalid an ordinance which imposed a fine upon any one who should permit snow to remain on the sidewalk abutting premises occupied or owned by him, longer than a period of six hours after it ceased to fall, or if the cessation is in the night time, then longer than six hours after sunrise on the next morning, for the reason, as there said, "the sidewalk, as was declared in the case cited, is as much a public highway, free to the use of all, as the street itself, and, upon principle, it follows the citizen cannot be laid under obligations, under our laws, to keep it free from obstructions in front of his property at his own expense any more than the street itself, either by the exercise of the police power, or by fines and penalties imposed by ordinance, or by direct legislative action." In *City of Chicago v. O'Brien*, 111 Ill. 532, we held the city had not the constitutional power to require the owner or occupant of premises to keep the sidewalk and gutters in front thereof free from snow and ice, or to sprinkle the same with ashes or sand where the snow and ice cannot be removed without injury to the pavement, and inflict a fine on him for a neglect or failure to do so, and declared the principle that "a purely public burden cannot be laid upon a private individual, except as authorized in cases to exercise the right of eminent domain, or by virtue of proper proceedings to enforce special assessments or special taxation."

The doctrine of these cases is unquestionably sound, but we do not assent to the view pressed upon us by counsel for the defendant in error company that they are decisive of the validity of the ordinance here under consideration. The defendant in error company does not occupy the position of the owner of property abutting upon a street. The owner of property abutting on a street has no interest in the street of the city, as a street, other than that possessed by every other citizen. He may be required, by way of special assessments or special taxation laid in pursuance of law, to make special contributions to defray the cost of constructing a sidewalk or improving the street, but this is upon the theory the value of his property is enhanced thereby. The burden, however, of keeping the sidewalk or street clear

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of snow, ice and other accumulations is a public burden, and no obligation is imposed upon the lot owner to perform that which it is the duty of the municipality, as the representative of the public, to perform. The lot owner has no special right, benefit or interest in the street in front of his premises. The defendant in error company has, however, been granted a special privilege to occupy the street with its rails, girders, poles or posts and wires, etc., and to operate its cars along its tracks so laid in the street. Horsemen and drivers of vehicles must yield the right of passage to its cars along and upon its tracks in the streets, as we have explained in *North Chicago Electric Railway Co. v. Peuser*, 190 Ill. 67. It has acquired privileges in the street which other persons, natural or artificial, do not possess. It actually occupies a portion of the street in a manner which would not be permitted without the aid of an ordinance. It has a qualified right of occupancy, and to that extent a property interest, in a portion of the street, and is authorized to transact its business for its own gain on the public street. It sustained a relation to the street and to the city entirely distinct from that of an abutting property owner, and it does not follow that the defendant in error company cannot be required to clean that portion of the street occupied by its tracks simply because an abutting property owner cannot be required to clean that portion of the sidewalk or street which is in front of his premises. The permission or license given the defendant in error company to use the street did not operate to deprive the city of the general power of control over the street delegated to the municipality by the General Assembly of the State. The license and privilege enjoyed by the defendant in error company are in subordination to the general power so residing in the city. The traction company, in virtue of the special privileges granted, has a qualified right of occupancy of that portion of the street between the outermost rails of its two lines of track which are laid in the street. The evidence shows that portion of the pavement of the street, for the convenience of the company, has been constructed differently by the company from what it otherwise would have been laid; that on that portion of the street covered by the tracks of the street railway the pavement has been laid flat, thus giving the surface of the street a flat crown of the width of sixteen feet, when, but for the tracks of the railroad, the pavement would have been laid with a slope from the center of the street to the gutter upon either side, and that the rails of the tracks prevent the filth of the street from reaching the gutters. It further appeared the tracks of the railway interfere with the work of cleaning both that portion of the street within the tracks and also that portion of the street between the outermost rails of the tracks and the gutters; that as much time was required to clean the portion of the street outside the tracks as would be required to clean the entire surface of the street if the railroad tracks were not there. All of these things must be considered in determining as to the reasonableness, necessity and justice of the requirements of

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the ordinance. True, the dirt and accumulations to be removed (so far as the evidence bears upon that question) were not brought by the traction company on that portion of the street occupied by its tracks, but it does appear its rails and road-bed, and the manner in which the crown of the street has been constructed for its convenience, tended to retain the dirt and filth there and to render it more difficult and expensive to remove the same, and also to make it more expensive to clean the street outside the tracks. The public health and comfort required the street should be cleansed of the dirt and filth which "accumulated" on the pavement between the tracks of the railway and about the rails of such tracks, and the exercise of the police power to that end devolved upon the city as a duty.

It does not seem unreasonable that the city should require the traction company to clean and render healthy that portion of the street occupied by the tracks of the road, under the circumstances of the case. In order to secure the public health and comfort the property of individuals and corporations may alike be subjected to reasonable restrictions and burdens. It does not appear unreasonable that the traction company, having, in the exercise of the special privilege enjoyed by it of using the street, contributed to the unsanitary condition which injuriously affects the public health and comfort, should be required to aid in removing such conditions. The privilege enjoyed by the defendant in error company to maintain its railway in the street and operate its cars thereon is to be exercised in the interest of the public, — it was to serve the public that the privilege was granted to it. Its business and property are impressed or affected with a public use. It may therefore be subjected to municipal regulations of a greater scope, in the interest of the public at large, than that of a railroad company exercising its franchises on its own road-bed. *Cape May Street Railway Co. v. Cape May*, 59 N. J. L. 396; *Charlotte, etc., Railroad Co. v. Gibbs*, 142 U. S. 386. Ordinances have been upheld which required street railway companies to keep the street between the rails of their tracks in repair, and which regulated the common use of the streets for street railway and ordinary travel, *North Hudson Railroad Co. v. Hoboken*, 12 Vroom, 71; to make the railroad tracks of street railway companies located in a street to conform to the requirements of the ordinance, so as to enable wagons, carriages and other vehicles to pass over tracks without inconvenience or danger, *North Chicago City Railway Co. v. Town of Lake View*, 105 Ill. 183; to remove snow from the street, *Broadway Railroad Co. v. Mayor*, 49 Hun, 129; prohibiting the use of sand, saltpeter or salt on the tracks of a street railway, *Dry Dock Railroad Co. v. Mayor*, 47 Hun, 221; *Traction Co. v. Elizabeth*, 58 N. J. L. 520; and ordinances to compel cleaning and sprinkling of the tracks of street railways have been not infrequently upheld as valid. Booth on Street Railways, sec. 280; 23 Am. & Eng. Ency. of Law, — 1st ed. — p. 999; *City, etc., Railroad Co. v. Savannah*, 77 Ga. 731. The ordinance here under considera-

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tion is general in its operation, affecting alike all corporations and individuals who are similarly situated and bear the same relation to the streets of the city. The rule of equality and uniformity is not invaded, nor does the ordinance unjustly discriminate against any individual or corporation.

It is urged the ordinance granting the license to lay the tracks and operate the street railway in Kinzie street constitutes a contract between the city and the traction company, the obligations whereof cannot be impaired by any ordinance subsequently enacted, and we are invited to consider whether the provisions of the ordinance so granting permission to occupy the street with the tracks of its railway, and operate its cars on such tracks, do not relieve the defendant in error company of the burden sought to be laid upon it by the ordinance here endeavored to be enforced. On the other hand, counsel for the city insist the latter ordinance requires the company to do no more than it is bound to do by a fair and reasonable construction of the terms and provisions of the former ordinance granting authority to the defendant in error company to occupy the street with its tracks.

The city, as the representative of the State, is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preservation of the health, safety and comfort of the people. The exercise of this power affects the public and becomes a duty, the performance whereof is obligatory on the city. The city could not, by the terms and conditions of the former ordinance, deprive itself of this power or relieve itself of this duty, nor could the defendant in error company, by any contractual terms of an ordinance, exempt itself from the proper and reasonable control of the municipal authorities in matters affecting the health, safety or comfort of the people. "No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power, for it is incapable of alienation. It cannot be doubted that a company which secures the right to use the streets of a municipal corporation takes it subject to the police power resident in the State as an alienable attribute of sovereignty." Elliott on Roads and Streets, p. 801.

We are of the opinion the ordinance under consideration is a reasonable and valid exercise of the police power, and that it should be obeyed and enforced accordingly. The judgment of the criminal court is therefore reversed and the cause is remanded to that court for further proceedings in conformity to this opinion.

Reversed and remanded.

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FORT SMITH v. HUNT. 84

1904. 72 Ark. 556.

BATTLE, J.¹ This appeal grows out of the prosecution of R. G. Hunt, general manager of the Fort Smith and Van Buren Light & Transit Company, charged with the violation of an ordinance of the city of Fort Smith.² *Annual Report of 25¢ per pole*

Appellee contends that the 25 cents demanded by the city of Fort Smith for each pole, under section one of ordinance No. 525, is "an explicit demand of rental for the use of the streets." The ordinance requires every person and corporation, who shall erect, maintain and use any pole or poles on any of the public streets and alleys of Fort Smith to pay to the city, as a license therefor, a sum equal to 25 cents for each of such poles. The sum is required to be paid as a license. As used in the ordinance, the word "license" means the sum paid for permission to erect or maintain poles in the streets and alleys of the city, for the purpose of defraying the expenses of regulating and controlling the use of the same, under the police power of the city. This is necessary for the protection of the public against the electricity with which the wires on the poles may be charged, against the falling of the wires and poles, and the obstruction of the public highway, and for other purposes. This is a duty the city owes to the citizen. *License for regulating*

The rules and regulations for the government of those erecting and maintaining poles in Fort Smith, and the duties of the city engineer in respect thereto, are prescribed, in part, if not wholly, by ordinance No. 300. But this does not exhaust the police power of the city in respect to such poles. The city council may hereafter prescribe other rules and regulations for the same object. For the purpose of paying the expenses of enforcing such rules and regulations already in force, a license fee may be demanded and collected.

Hot Springs Electric Light Co. v. Hot Springs, 70 Ark. 300, is unlike this case. In that case this court merely held that the city of Hot Springs had no right to demand and collect a rental charge for the use of the ground occupied by the poles of the light company.

The following words, used in *Fayetteville v. Carter*, 52 Ark. 301, 302, are applicable in this case: "The power to license and regulate, granted by the statute, was conferred solely for police purposes; and municipal corporations have no right to use it as a means of increasing their revenues. They can require a reasonable fee to be paid for a license. The amount they have a right to demand for such fee de-

¹ Arguments and part of opinion omitted. — Ed.

² On March 19, 1900, the said city enacted ordinance No. 525, by which it required the owners of every electric light or street railway pole standing upon the street, avenue or alleys of said city to pay said city an annual license of 25 cents per pole.

pend upon the extent and expense of the municipal supervision made necessary by the business in the city or town where it is licensed. A fee sufficient to cover the expense of issuing a license, and to pay the expenses which may be incurred in the enforcement of such police inspection or superintendence as may be lawfully exercised over the business, may be required. It is obvious that the actual amount necessary to meet such expenses cannot, in all cases, be ascertained in advance, and that it would be futile to require anything of the kind. The result is, if the fee required is not plainly unreasonable, the courts ought not to interfere with the discretion exercised by the council in fixing it; and unless the contrary appears on the face of the ordinance requiring it, or is established by proper evidence, they should presume it reasonable."

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WISCONSIN TELEPHONE COMPANY v. MILWAUKEE. 85

1905. 126 Wis. 1.

APPEAL from an order overruling plaintiff's demurrer to defendant's answer. The complaint alleges that plaintiff was a corporation which had erected telephone poles in the defendant city and that an ordinance of the city provided for inspection of the poles and an annual license fee of one dollar per pole; that this fee is unreasonable; that plaintiff's permission to operate its system was derived from the state and not from the city; and asks for an injunction against the enforcement of the ordinance. The answer denies that the fee is unreasonable, and that the ordinance is void.¹

KERWIN, J. The questions presented here upon the facts admitted by the demurrer are thus stated by respondent:

"First. Has the city authority to exact a license such as is provided for in the ordinance, the enforcement of which the appellant seeks to enjoin?

"Second. Does the ordinance in question contravene the fourteenth amendment of the federal constitution and similar provisions of the Wisconsin state constitution?"

The first proposition stated by counsel practically embraces the controversy before us, and we shall proceed to consider the right of the defendant city to exact the license fee. It is apparent from the argument of counsel for respondent, as well as from the authorities cited, that the ordinance is sought to be upheld under power of the defendant city to license the plaintiff and exact the license fee provided for in the ordinance. It is, however, contended that the license fee is not

¹ This short statement of facts is substituted for that of the Reporter. Arguments omitted. — Ed.

exacted for any right or privilege conferred upon the plaintiff, but simply as a police regulation, and reference is made to the provisions of the city charter conferring power to prevent the incumbering of streets, lanes, and alleys, and giving the city the right to control and regulate the streets, alleys, and public grounds of said city, and under these provisions, as well as under the general police power, it is contended that the ordinance is in the nature of a police regulation. No power is conferred upon the defendant under its charter or by any law of this state to grant to the plaintiff the privilege of constructing, maintaining, or operating its telephone lines upon the streets of defendant city. This authority is specifically conferred by the legislature of this state, subject only to the provision that it shall not "obstruct or incommode the public use of any road, highway, bridge, stream or body of water." No authority is conferred upon the defendant to impose any other condition upon the plaintiff except such as it may lawfully impose under its power to control and regulate the streets, alleys, and public grounds and prevent the incumbering thereof, and its general police powers. Beyond this it has neither the right to confer any privilege upon the plaintiff in the use and occupation of streets, nor to impose conditions. *State ex rel. Wis. Tel. Co. v. Sheboygan*, 111 Wis. 28, 86 N. W. 657; *Marshfield v. Wis. Tel. Co.* 102 Wis. 604, 78 N. W. 735. It is very clear that the defendant had no power to exact a license fee from the plaintiff for the privilege of constructing, maintaining, or operating its telephone lines upon the streets of defendant city. *Wis. Tel. Co. v. Oshkosh*, 62 Wis. 82, 21 N. W. 828. And it is conceded on the part of the respondent that the ordinance can only be sustained on the theory of a police regulation. It will be seen, however, that the cases cited by respondent are cases where the license fee was upheld upon the ground that the municipality had the right to grant some privilege to the company licensed, and for the granting of which a license fee was sustained, or where the purpose of the ordinance was to regulate and not to license. Counsel for respondent frankly concedes that the city has no franchise to grant to the plaintiff and no power to confer under which the poles and wires may be maintained in streets, but contends that under the broad power of regulation conferred by the legislature and the police power it has the right to make and enforce reasonable regulations for the protection and safety of its citizens, and quotes at length from *W. U. Tel. Co. v. Philadelphia* (Pa.), 21 Am. & Eng. Corp. Cases, 40, 12 Atl. 144; but the case is not in point upon the proposition asserted, for the reason that the city of Philadelphia had the power to grant to the company the right to occupy the streets and impose upon the company such conditions and regulations as the municipal authorities might deem necessary, and the court said:

"That such is the relation of the city to the various companies which had been empowered to occupy its streets with a view to gain is to me abundantly clear, and they should not grudge a reasonable compensa-

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no power to exact license fee for privilege

tion for the space they occupy and the risks which she incurs on their account."

Council quotes from *C., M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418, 72 N. W. 1118, to the effect that the charter of a corporation does not exempt it from police supervision and regulation, which is true as applied in that case; but the question here is not one of escape from police regulation, but whether the ordinance of the defendant is within it. *People ex rel. N. Y. E. L. Co. v. Squire*, 107 N. Y. 593, 14 N. E. 820, clearly involves a regulation under a statute of New York concerning such companies, and which provided for the removal of such wires and cables from the surface of the streets and laying the same under ground, and the court said (107 N. Y. 602, 14 N. E. 823):

"The claim that this law is void because it imposes a tax on the companies referred to cannot be maintained. The act of 1884 imposes the duty upon such companies to remove and cause to be laid underground all such wires and cables as are required in their business, and there is no reason why such companies should not be subjected to the payment of all expenses incurred in the construction of works required to carry on their own business."

In *State ex rel. Wis. Tel. Co. v. Janesville St. R. Co.* 87 Wis. 72, 57 N. W. 970, the question involved under the ordinance was one of reasonable regulation. The ordinance provided for the location and use of electric wires in the streets, reasonable safeguards for the same, and a penalty for the violation of the regulation. No license fee whatever was exacted. It was purely a regulation requiring safeguards and providing a penalty for failure to furnish the same. *Marshfield v. Wis. Tel. Co.* 102 Wis. 604, 78 N. W. 735, involved the question of the city's right to control its streets and prohibit the incumbering of the same, and it was held that under this power the city had the right to prevent the incumbering by telephone poles certain of its streets, in the exercise of a reasonable discretion, and that the common council had a reasonable discretion in the location of such poles. The dominant purpose of the street being for public passage, any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use. The decision only goes to the extent of authorizing a reasonable regulation on the part of the city. In *Baltimore v. Baltimore T. & G. Co.* 166 U. S. 673, 17 Sup. Ct. 696, it was held that the street railway company, occupying the streets by permission of the municipality, was subject to reasonable regulations by subsequent ordinances, and that the city did not exhaust its power of regulation by one exercise of it. In *Philadelphia v. W. U. Tel. Co.*, 11 Phila. 327, the telegraph company commenced the construction of a new line on the streets, and the city sought to regulate such construction. Its right of regulation was sustained on the ground that the telegraph company was occupying the streets by permission of the city under the restriction that it should not use the streets of Philadelphia without the consent of the mayor and city council first had and ob-

tained. The cases generally cited by counsel for respondent from Pennsylvania and from the Supreme Court of the United States upon appeal from that state turn upon the laws of that state, which authorize municipalities to grant permission to such companies to occupy the streets and impose such conditions and regulations as the municipal authorities may deem necessary. No such power is conferred upon municipal corporations in Wisconsin. *State ex rel. Wis. Tel. Co. v. Sheboygan*, 111 Wis. 23, 86 N. W. 657. *Ash v. People*, 11 Mich. 347, upholds the right of the city of Detroit to pass an ordinance prohibiting the keeping of stalls for the sale of fresh meats outside of the public markets without license and payment of license fee under its charter, which expressly empowered the common council to license and regulate butchers and the keepers of shops and stalls. *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463, is a case where right to license is upheld under express legislative authority given. Also in *State v. Herod*, 29 Iowa, 123, power was conferred upon the city to license. In St. Louis the title to the streets being in the city, and the charter giving the right to license, tax, and regulate telegraph companies, it was held that, the city having the right to grant the use of the streets to telegraph companies, it regulates the use when it prescribes the terms and conditions upon which they shall be used. The case turns upon the power of the city to grant the right to use the streets to the telegraph company. *St. Louis v. W. U. Tel. Co.* 149 U. S. 465, 13 Sup. Ct. 990.

But we will not further extend discussion of cases cited by respondent. It is manifest they do not support the proposition that the defendant has authority to exact a license such as is provided for in the ordinance in question. The power rests in the state to determine what occupations shall be licensed. *Wis. Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *State ex rel. Wis. Tel. Co. v. Sheboygan*, 111 Wis. 23, 86 N. W. 657; *Cooley*, Const. Lim. (7th ed.) 884. And it is not claimed that any power had been granted to the defendant by the legislature to license the plaintiff, nor is it claimed that the plaintiff has failed to comply with all regulations respecting its use of the streets, or that it has violated the law granting it the right to occupy the streets by obstructing or in any manner interfering with the public use of the streets of defendant. And, no power having been delegated to defendant to license plaintiff, it could not exact a license fee as a means of raising revenue. *Wis. Tel. Co. v. Oshkosh*, *supra*; *State ex rel. Wis. Tel. Co. v. Sheboygan*, *supra*; *Marshfield v. Wis. Tel. Co.* 102 Wis. 604, 78 N. W. 735; *State ex rel. Wis. Tel. Co. v. Sheboygan*, 114 Wis. 505, 90 N. W. 441; *Mich. Tel. Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 386. But it is claimed that the ordinance is a regulation and not a revenue measure, and that it may be sustained upon the theory that the defendant has the right to impose such fee for supervision and inspection under the police power. Whether the city has power to impose any fee upon the plaintiff for inspection and super-

Id. - attempt to charge

vision is not necessary to decide, and we do not decide, in this case, because it is clear that the ordinance was passed for no such purpose, but, on the contrary, was an attempt to charge plaintiff for the privilege of maintaining its poles and wires in the streets. If the city had power to grant any privileges in the streets to the plaintiff, or had express authority from the legislature to license the plaintiff so as to bring its case within the authorities cited, the respondent's position would be quite different. But, as before observed, the defendant had no right or privilege to grant to the plaintiff, and no power to prevent its use of the streets in a reasonable manner consistent with the public use, and the provisions of the ordinance set out in the statement of facts show that it was a revenue measure and not a regulation.

Revenue measure

The ordinance requires telephone and telegraph companies to apply annually for a license to maintain, for the ensuing year, the poles and cross-arms then erected, and provides for payment, for the use of the city, of one dollar for each and every pole authorized to be maintained thereby. The ordinance further provides that all revenue derived from such license shall become part of the general city fund, and imposes a penalty for any violation, and further provides that the erection or maintenance of any single pole or cross-arm in violation of the provisions thereof shall constitute a distinct and separate offense thereunder. The plain import of this ordinance is that it grants the privilege to telephone and telegraph companies to occupy the streets of defendant city with their poles and cross-arms in consideration of the license fee exacted. *Neuman v. State*, 76 Wis. 112, 45 N. W. 30; *Chilvers v. People*, 11 Mich. 43; *Home Ins. Co. v. Augusta*, 50 Ga. 530. There is nothing in the ordinance indicating that the fee is exacted for inspection or supervision, or that it will be used for such purpose, or that any such amount is necessary to defray the expense of such inspection and supervision, and it is quite obvious that the aggregate amount sought to be collected would be far beyond the reasonable expense of such inspection and supervision. We think it safe to say that any reasonable cost of inspection and supervision would not exceed one tenth of the revenue chargeable according to the terms of the ordinance. True, where the power to license exists, a reasonable discretion is vested in the municipality, but courts have a right to look into ordinances with a view of determining whether they are passed for the purpose of revenue, although sought to be upheld as police regulations. Even if the city had the right to impose reasonable charges for inspection and supervision, it should not be permitted under the guise of such power to collect large amounts of revenue for the benefit of the city regardless of the amount necessary for such inspection and supervision. And where the court can clearly see that revenue and not regulation is the aim and not the incident, and no power is given to license the occupation, the ordinance is void. *Wis. Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *State ex rel. Wis. Tel. Co. v. Sheboygan*, 111 Wis.

Revenue measure
License fee
Inspection and supervision

substance not fact

23, 40, 41, 86 N. W. 657; *Postal T. C. Co. v. Taylor*, 192 U. S. 64, 24 Sup. Ct. 208; *Mich. Tel. Co. v. Benton Harbor*, 121 Mich. 512, 80 N. W. 886; *Mayor, etc., v. Second Ave. R. Co.* 32 N. Y. 261; *Memphis v. Am. Exp. Co.* 102 Tenn. 386, 52 S. W. 172.

It follows from what has been said that the order must be reversed.

By the Court.—The order of the court below is reversed, and the cause remanded with instructions to sustain the demurrer.

SECTION V. *Power to expend money.*

15 cases

NEW LONDON v. BARNARD.

86

1858. 22 Conn. 552.

BILL in equity to enjoin the city of New London from expending money to celebrate the anniversary of national independence.¹

STORRS, J. It is well established, that corporations have only such rights and powers as are expressly granted to them, or as are necessary to carry into effect the rights and powers so granted.

It was accordingly held, in *Stetson v. Kempton*, 13 Mass. R. 272, where this principle is very fully vindicated and explained, that towns have no authority, in their corporate capacity, in time of war or danger of hostile invasion, to vote money and cause it to be assessed upon the inhabitants, for the purpose of raising money to give additional wages to the militia, or for the purpose of defence in cases of invasion: and in *Hodge v. The City of Buffalo*, 2 Denio, 110, that the defendants had no power to contract a debt, for the purpose of defraying the expense of celebrating the anniversary of our national independence. In the former of these cases, the action was against the assessors of the town, who assessed a tax, which was collected, in part, of the plaintiff, in pursuance of a vote of the town, to raise a certain sum of money for the payment of additional wages to the militia, and other expenditures of defence; and the court refrained from expressing an opinion on the question whether any money actually in the treasury of the town, beyond what is needed for its ordinary expenses and which is unappropriated, may be disposed of in pursuance of a vote of the inhabitants, for the common defence. In the latter case, the action was brought against the city of Buffalo, to recover the amount of the expenses which it had, by a vote, authorized a committee to incur on its behalf. We are unable to perceive any just ground of discrimination between a disposition of moneys already

¹ This short statement substituted for that of the Reporter. Arguments and part of the opinion omitted.—Ed.

in the treasury of the corporation, and a vote to raise money by a tax, or a contract to pay money, for such unauthorized purpose.

We do not find, nor have we been referred to, any express power in the charter of the city of New London, nor is there any general law, authorizing an expenditure of money, for the purpose for which the vote in question was passed; nor is any power conferred on that city, for the exercise of which such an expenditure is necessary. We think, therefore, that that vote is not binding on the plaintiffs.

HITCHCOCK v. ST. LOUIS.

1872. 49 Mo. 484.

87

WAGNER, J.¹ This suit was brought to test the validity of an ordinance passed by the city council of the city of St. Louis, by which the sum of \$1,500 was appropriated out of the general revenue and ordered to be paid to the mother superior of St. Ann's Orphan Asylum and Widows' Home, as a donation from the city toward the maintenance and support of that institution. The court below decided that the ordinance was invalid, and that the council possessed no power to make the appropriation, and from that decision this appeal is prosecuted. The general grant of corporate powers contained in the charter incorporating the city gives it authority to "purchase, receive and hold property, real and personal, within said city, and also hold the like beyond the limits of the city, to be used for the burial of the dead of the city; also for the erection of waterworks to supply the city with water; also for the establishment of a hospital or hospitals for the reception of persons infected with contagious and other diseases; also for a poor-house or poor-houses, work-house, house of correction, or for any other purpose; and may sell, lease, or dispose of property for the benefit of the city; may receive bequests, gifts and donations of all kinds of property, within and without the city, for charitable and other purposes, and may do all acts necessary to carry out the purposes of such bequests, gifts and donations, with power to sell, lease, dispose of and manage the same." In the article defining the legislative powers of the city council, the council is invested with power "to make all such ordinances, not inconsistent with the laws of this State, as may be expedient, maintaining the peace, good government and welfare of the city, and its trade, commerce and manufactures." Do any of the above enumerated grants authorize the city council to appropriate or give away the public moneys as pure donations or gratuities? We do not think the donation can be upheld on the ground that it is germane or incident to any power granted. The council may exercise implied or incidental powers wherever they

¹ Arguments omitted.—Ed.

See 49 Mo. 484

are necessary to carry out or execute those clearly expressed. And where the corporate authorities have a discretion, courts will not ordinarily interfere. But when they act they must show some grant or power to authorize their action. The city council, in the discharge of their duties, do not act for themselves, but for the public. They are trustees clothed with a trust, not for the corporation as such, but for the citizens and the public who have confided the authority to them. The charter is the power of attorney which defines and limits the objects and powers with which they are entrusted. The diversion of the money of the tax-payers for any purpose other than that which is expressed in the charter, is a perversion of the trust and an excess of authority. That there is no express power in the charter conferring authority to make donations, gifts or gratuities, is too clear to require any argument.

Council trustees for public not for corp.

No express power

The donee is a mere private institution, not under the control of the city and having no connection with it. If the tax-payers' money can be taken and given to it, it may be also to any other private corporation, or it may be distributed gratuitously to individuals. It is clear that the charter confers no such authority, and we think, therefore, that the judgment should be affirmed. The other judges concur.

Can't give to private institution

COOLIDGE v. BROOKLINE. 88

1874. 114 Mass. 592.

ENDICOTT, J. This is a petition by ten tax-payers to restrain the town of Brookline from paying money from its treasury for an alleged illegal purpose. Gen. Sts. c. 18, § 79. On October 13, 1873, an order was introduced in the board of aldermen of Boston, that the mayor be requested to petition the Legislature for an act annexing a portion of Brookline to Boston. It does not appear that the order was passed, or that any further action was taken upon it. The selectmen of Brookline, October 17 following, issued a warrant for a town meeting to be held October 28, to act, among other things, upon the proposition of the city of Boston to annex thereto a part of Brookline. At this town meeting it was voted that certain persons "be a committee for the purpose of preventing the annexation of the town, or any part thereof, to the city of Boston, and that they be authorized to employ counsel, and such other means as they deem expedient." To defray their expenses, they were authorized by the same vote to draw orders on the treasurer, who was directed to pay the same, and charge such payments "to the appropriation for contingencies." It was also "voted to raise and appropriate for contingencies \$10,000."

Expenditure to oppose act annexing it to Boston

The answer of the defendants admits that if a petition is presented to the Legislature asking for an act annexing the whole or any part of

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102

Brookline to Boston, the committee will appear with counsel before the Legislature or a committee thereof, and oppose the passage of such act, and pay their expenses by orders drawn in pursuance of the vote of the town. And they claim that the town has the legal right so to appoint a committee and appropriate money, and that the votes of the town "are valid, and within the lawful power of the town of Brookline to pass."

A copy of a petition by certain inhabitants of Brookline to the Legislature for a change in the boundary lines between Brookline, Boston and Brighton, was served on the town October 20, but this was after the warrant for the town meeting had issued, and no action of the town on this petition is before us. The action of the meeting was based upon the order introduced into the board of aldermen of Boston. Several questions were raised by the petitioners upon the regularity of the proceedings at the meeting, and it was argued that the town could take no legal action upon the mere introduction of such an order, and could not legally appropriate money for contingencies.

As these questions relate to the formality of the proceedings, and do not involve the decision of the case upon its merits, we prefer, without expressing any opinion upon them, to consider the principal question, which has been fully presented in the arguments of counsel. That question is distinctly raised in the answer, and the town asserts that it is the intention of the committee to use the money appropriated for the purposes named in the vote, and that it is legal so to do. The simple question therefore is, has a town power by law to tax its inhabitants for expenses incurred in opposing before the Legislature the annexation of the whole or part of its territory to another city or town?

In *Minot v. West Roxbury*, 112 Mass. 1, it was held that a town could not legally raise money and tax its inhabitants to pay the expenses of a committee appointed to petition the Legislature for its annexation to Boston, and to advocate and urge such annexation with counsel before the Legislature. This decision rested on the proposition that such action was not in the line of its corporate duty as a town, and was not for a purpose, and did not relate to a subject matter for which towns by the statutes, either in terms or by implication, are empowered to raise money and tax their inhabitants. Such power to tax must in all cases spring from the statutes, and must be found there in terms, or be necessarily inferred from some corporate duty imposed or some corporate right given. The only exception to this rule is confined to a few cases of usage relating to the comfort and convenience of the inhabitants of a town, such as town clocks, hay-scales, pumps, reservoirs, &c., and is not to be extended. Towns have been kept rigidly within this rule both by the Legislature and the courts. Its observance is necessary from the character of their organization and from the nature of the delegated powers which they exercise; and as there is no controlling power provided by law to restrain and limit them in the expenditures they can by law incur, and for which they can lay taxes, it is of the

first importance to the tax-payer that they exercise this great power for authorized purposes, and a summary remedy against abuse of such legal power is given by the statute under which this bill is brought.

The cases on this subject, as bearing on the question here presented, were so fully considered in *Minot v. West Roxbury*, that it is unnecessary to review them here. As preliminary to this discussion it may, however, be said that Gen. Sts. c. 18, § 10, recites in detail the purposes for which towns may raise money, closing with the clause, "For all other necessary charges arising therein." These words are held to mean all necessary charges incurred in the exercise of any duties conferred or powers given in other portions of the General Statutes or in subsequent statutes, necessarily involving the expenditure of money, but what are necessary charges must in all cases be determined by the statutes.

Other necessary charges.

Nothing in the statutes being found that could in terms or by implication make the expenses for procuring annexation to Boston, by an act of the Legislature, a necessary charge within the meaning of the statute, the vote of West Roxbury was declared illegal. See *Attorney General v. Norwich*, 16 Sim. 225. *Attorney General v. Guardians of the Poor of Southampton*, 17 Sim. 6. *Great Western Railway v. Rushout*, 5 DeG. & Sm. 290, 309. *Simpson v. Denison*, 10 Hare, 51, 61. Upon a careful examination of the statutes, and applying the same rule of construction as in *Minot v. West Roxbury*, we find nothing in terms, or by necessary implication, making expenses for resisting a change in boundary, or annexation in whole or in part to another town, one of the necessary charges named in the statute. The bearing of Gen. Sts. c. 2, § 9, will hereafter be considered. The case, so far as the statutes are concerned, falls within the decision of *Minot v. West Roxbury*, unless a distinction can be made between the right of a town to raise money to promote and obtain a fundamental change in its organization by the sovereign power, and its right to defend the existing order of things, and preserve inviolate the territory within its jurisdiction, before the same tribunal, and this distinction has been urged with much force by the counsel for the defendants.

Expenses to procure annexation illegal.

On whether dist. in procuring annex.

It is contended, while admitting that a town cannot raise money to change its organization by annexation, First, that the right to defend its existence, and maintain its corporate limits when assailed, is incident and necessary to the exercise of its corporate duties, and the accomplishment of the purposes for which it was created; that questions in which it is deeply interested are involved by such action, as what its boundary shall be, what of the town property shall be taken, whether the portion left will be sufficient to carry on the town organization, and many other questions of vital importance, all of which equally apply to the annexation of the whole to another city. Second, that they have a right to be heard on these questions before the Legislature, or a committee thereof sitting as a tribunal to pass judgment between the town and those persons or corporations seeking to disturb their rights;

Cont.

and that this is made certain, and that the town shall appear and be heard is clearly implied, by the provisions of Gen. Sts. c. 2, § 9.

It is claimed that, this right to defend being a corporate duty, as incident to its exercise, the inhabitants may be taxed for the necessary expenses attending it, which are within the meaning of the words "necessary charges."

It is important to distinguish the precise nature and extent of the right which it is asserted to be the duty of the town to defend. If it is in no absolute or qualified sense in the nature of a vested right, no corporate duty would seem to attach to it; and the town having no corporate duty in relation to it, no consequent power to raise money is to be implied.

The right as asserted in this case, is the right of the town of Brookline to continue as a municipal corporation with all its power and privileges within the territorial limits now assigned it by law. Questions might arise in regard to other rights and powers conferred on towns by general or special legislation, of a different character, subject to different rules. But here the simple question is, has this town any right to its present territorial limits, which it has a corporate duty to defend as against the action of the sovereign power from which it derives its existence, and by which it is invested with certain subordinate powers of government for local purposes over a given territory? That it has such a right to these limits that it may defend them before all other tribunals is unquestionable. Such right may be said in one sense to be vested to such extent that it may be asserted and maintained against all persons and powers except the government. Numerous illustrations of this could be given, as where corporations, persons, or officers are clothed with certain powers, subject to the control of the Legislature. But as against the government itself, such right is in no sense vested, and no consequent duty is imposed on the corporation to resist a change.

The towns of Massachusetts do not exercise their powers within their limits under a grant, or by virtue of any contract, express or implied. They are political organizations, created for political purposes, and as mere instrumentalities by which the Legislature administers certain laws within particular limits. What those laws shall be, it is for the Legislature to determine, and from time to time modify, change or repeal. Within what limits a particular municipal corporation shall exercise these powers, whether it shall be divided, its boundaries changed, or its territory annexed to another municipality, is for the Legislature, in the absence of constitutional restriction, to determine, as the public good or the wants or necessities of inhabitants may require. Warren v. Mayor, &c., of Charlestown, 2 Gray, 84, 104. Opinion of Justices, 6 Cush. 578. In the determination of these questions the corporation as such has no interest — no corporate duty to perform. The correctness of this proposition is made manifest by a cursory review of the manner in which towns are created and of their

1) No corp. at
to corp. limits

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relations to the state. An act establishing a town extending over a certain territory, brings within its jurisdiction all persons residing within its limits. It is imperative and binding without assent or acceptance, though the Legislature in its discretion may make that a condition of its going into operation.

The corporation has no authority to enlarge its powers, or to determine who shall comprise its members, and has no duties to perform but those imposed by law. It cannot surrender its franchises or dissolve itself. It is created for public ends, and can only cease to exist by the act of the power creating it. While, therefore, it has corporate duties to perform to the extent imposed by the Legislature, it has no duties to perform in regard to what these duties shall be, or over what territory, or for how long a term they shall be exercised. These duties cannot extend beyond the powers granted and include any duty to maintain such powers. This question is entirely independent of the agent, trustee or depository called a town and intrusted with municipal power, and belongs exclusively to the Legislature. *People v. Morris*, 13 Wend. 325. *State Bank of Ohio v. Knoop*, 16 How. 369, 380. *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169, 187. *Warren v. Mayor, &c., of Charlestown, supra.* *Eastman v. Meredith*, 36 N. H. 284. Dillon on Mun. Corp., § 23, and following sections.

It is difficult in considering this question always to distinguish between the wishes and interests of the inhabitants of the town for the time being, and the powers and the duty of the town itself. Much confusion arises from failure to keep the distinction in mind. But as interests and wishes change, and the corporation always remains the same, the only true test is to be found in the legal power of the town. The annexation of the town of Brookline to Boston, or a change in its boundaries, may seriously and vitally affect the interest of its present inhabitants, and be repugnant to the wishes and feelings of a large majority, but they cannot use the corporate powers of the town to enable them to oppose such change, and thereby impose burdens on the tax-payer, when the town has no corporate duty imposed or implied by law. And that the town has no such duty necessarily follows from the character of its powers, and from its relations to the government. A striking instance of the application of this rule is found in *Stetson v. Kempton*, 13 Mass. 272. In the war of 1812, with Great Britain, the enemy were on the coast in sight of Fairhaven, they were then laying waste and destroying property at other places, and the property and dwellings of the inhabitants of Fairhaven were in immediate danger. The town, at a regular meeting, voted unanimously \$1200 for additional pay for militia and other expenditures of defence. But the court held the vote to be illegal; that the town had no authority to raise money for such purpose, and no legal duty to protect and defend its inhabitants from invasion.

Several English cases were commented on in the argument, some of which have been already cited. They all arose upon the construction

of the municipal corporation act, 5 & 6 Wm. IV. c. 76, § 92. That section, after specifying certain expenses to which the borough fund is to be applied, uses words similar in their meaning and application to the words "other necessary charges" in our own statute: "all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this act." Lord Cottenham said in *Attorney General v. Mayor of Norwich*, 2 Myl. & Cr. 406, 425, that these words must mean "the expenses which would arise out of the duties imposed on the parties by the act." And in *Queen v. Mayor of Sheffield*, L. R. 6 Q. B. 652, it was held that the expenses incurred for the benefit of the inhabitants by the mayor and aldermen of Sheffield, in opposing in parliament a bill introduced in relation to a supply of water to the town, could not possibly be an expense necessarily incurred in carrying the act into execution. No duty in that respect being imposed by the act, no power to use the borough fund followed.

We are clearly of opinion that a town has no corporate duty to defend its boundaries or its existence before the Legislature, and has therefore no right to tax its inhabitants therefor.

But the defendants also claim that a town has a right to be heard by the Legislature, and that this right is so recognized by Gen. Sts. c. 2, § 9; that it may appear legally and defend its right as a town and may tax its inhabitants for the expenses, and that such action is in the nature of a suit before the General Court, having jurisdiction of the premises.

It was said in *Minot v. West Roxbury*, that the right of the people to assemble and petition for redress of grievances was guaranteed by the Declaration of Rights, Art. XIX. The inhabitants of Brookline have the undoubted right to assemble and consult upon the common good, to express their opinions for or against annexation or change, and take such means either by address, petition, remonstrance, or through persons properly appointed, to inform the Legislature of their wishes. The Legislature may take such course in dealing with the application, and in hearing the inhabitants or their committee, as it may judge expedient and proper. The court cannot decide upon the propriety of such application or how it should be heard; that is exclusively for the Legislature, and we have no jurisdiction over the question.

It is only on the validity of the vote to raise money that we can pass, and while the committee appointed by Brookline may properly present the wishes of the town in regard to annexation before the Legislature, we do not think that this general right to address the Legislature gives by implication any right to tax for the expenses that the committee may incur. Nor do we think that the provisions of Gen. Sts. c. 2, § 9, imply any additional powers in the town in that respect. "Whoever intends to present a petition affecting the rights of a city or town, shall cause a copy to be served on the city or town" in the manner provided.

The word "rights" in this section cannot be held to enlarge existing rights, or to give to towns any powers or privileges not already pos-

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essed. The whole scope of this section, and of the preceding and following sections, relates to notice, and the phraseology must be construed with reference to that purpose. These sections simply provide, that when parties propose to petition the Legislature for legislative action, they shall give notice to persons or corporations who may be affected by such action. It is not imperative for the parties notified to appear, or take any action, nor is there any intimation in the statute what action shall be or may be taken. A hearing before a committee is not the only way that parties notified may present their views; they may appear by remonstrance, or may assent to and join in the petition. The inhabitants of a town may do so by vote at a town meeting under the general power already stated, or by instructing their representatives, or may in some other manner express their opinions or wishes. There is nothing in these provisions implying that expenses may or will follow such notice by the party notified. Nor can it be presumed that parties so notified, or towns, may only oppose such petition. If any rights to act are to be inferred from such notice, it must be optional to the party notified to assent to or aid such petition as well as to resist it. If expenses are implied in such proceedings, the right to incur them must follow either course the town may take. But as it is settled, and was so conceded on the argument, that a town is precluded from paying expenses to promote annexation upon such notice, it would seem to follow that under this notice no action could be taken by the inhabitants of the town in any way to express its assent, but only to oppose. This cannot be the construction of the statute. The notice must, therefore, be taken to be only a notice to the inhabitants of a town, for them to take such action as they may by existing provisions of law, and not as in any way enlarging or extending the powers or privileges of the town as a corporation.

There is another view of this statute, which forbids the construction that any rights are conferred upon the town. It is evidently an act framed for the convenient ordering of the legislative business, and for preparing, before the Legislature meets, the service of such notices as the Legislature might find it necessary to issue for the purpose of obtaining proper information on the questions presented upon petition. It regulates the method in which petitions shall be presented, and does not increase or diminish the rights of parties to be affected by legislation on that particular subject. For on all subjects with which the Legislature may deal upon petition, it may also deal of its own motion and without notice to parties, and it is not precluded from such action by this statute.

These views are confirmed when we consider the character and usages of the tribunal to which the petition, upon which notice is to be given, is to be presented, and afford an answer to the argument of the defendants, that this money is to be expended in defence of a suit brought before the General Court, having jurisdiction of the premises. The Legislature is the law-making branch of the government. It

passes such laws as in its judgment the public good requires. It may legislate on any subject within its powers, whether called to its attention by petition or not. When called to its attention by petition, it may act upon it at once, or it may seek further information before acting. It may do this in many ways, at its own bar, or through its own members by debate, or by a special committee of its members for that purpose, or by a standing committee to whom such questions are usually referred. Such committee may obtain its information either from its own investigations, or by hearing parties who present themselves, or by sending for persons and papers, under special orders of the Legislature, and paying the expenses attending such requisitions. It reports its decision to the main body, in the form of a recommendation for its action, which is passed upon after consideration and debate. The committee is in no sense a court; there is no final decision, there is no default in not appearing before it upon the statute notice, and no rights are necessarily lost by failing to appear. The rights of parties are not litigated before such committee, and the hearing of parties before it is in no sense a trial. It is simply an organ of the body appointing it, to obtain information upon which they may act justly and intelligently.

The proceeding has no analogy to a suit at law, and a town has no such public duty to perform, as when it is summoned to answer to legal proceedings instituted in court.

We think it evident that it was the intention of this act, that notice should be given to the inhabitants of towns of all petitions affecting their interests for the purpose of giving them an opportunity to take proper action, and communicate their wishes on the subject to the Legislature. But it is not to be presumed from the language of the act that it was intended to arm towns, as corporations, with the power to raise money to prevent, before the Legislature, any change in their boundaries, or rights over their territory, which it is the constituted duty of the Legislature to make, if the public good requires. The Legislature might well hesitate to give such power, not only because it might obstruct the action of the legislative body, but be open to great abuse, and obnoxious to a sound public policy.

We are therefore of opinion that the injunction should issue as prayed for.

Decree accordingly.

THORNDIKE v. CAMDEN. 87

1889. 82 Me. 39.

EMERY, J.¹ This case is presented by the defendants' exceptions to the ruling of the presiding justice awarding judgment for plaintiff on an agreed statement of facts. In submitting a case upon an agreed

¹ Statement of facts and arguments omitted. — Ed.

the personal city can't reimburse any
T. 22.12

statement, the plaintiff has the burden of stating all the facts necessary for the maintenance of his action. He must not depend on inferences. Omissions will be construed against him.

In this case, we must assume that the plaintiff was the duly elected and qualified collector of taxes in the defendant town for the year 1873; — that he had a legal and sufficient warrant to collect a tax of \$816, legally assessed against a party liable to taxation in said town, and styled in the warrant, "D. Knowlton & Co."; — that he made no effort to collect said tax farther than to illegally permit them to give their note instead of the money for their tax; — that he took the note as money, and accounted for it as money to the town treasurer; — that twelve years afterward, in 1885, the note not having been paid, the town voted under proper articles in the warrant to pay him \$300 in consideration of the premises, the said sum to be raised by assessment.

Has the town the power to impose a tax for such a purpose? Clearly not, unless the plaintiff's claim is incident to, or connected with, the exercise by the town of its legal powers. A town is not a business or a charitable corporation. It is simply a political organization, created as a convenient agent for the performance of certain governmental duties and purposes. Its powers are almost entirely political, and are properly limited to its duties. It has only such control over the citizen, and his money or property, as is expressly granted to it, or is necessary to the performance of its duty to the public. Indeed, a town is only a trustee for the public. It does not own the money in its treasury, nor the municipal property generally, but only holds them in trust for the public, and subject to public control through the legislature. *Dillon Mun. Corp.* 61; *Merrivether v. Garrett*, 102 U. S. 472.

The narrow limit of the taxing power of a town, and of its power over money paid into its treasury from other sources than town taxes, is illustrated by many decided cases. In the absence of a special statute, a town cannot raise money for purposes of local defense against an invading enemy. *Stetson v. Kempton*, 13 Mass. 272. Nor to build places of amusement for its inhabitants. *Ibid.* Nor to abate taxes. *Cooley v. Granville*, 10 Cush. 56. Nor to celebrate an anniversary. *Tash v. Adams*, 10 Cush. 252. Not even "Fourth of July." *Hood v. Lynn*, 1 Allen, 103. Nor to provide uniforms for a local military company. *Clafin v. Hopkinton*, 4 Gray, 502. Nor to obtain a city or town charter. *Frost v. Belmont*, 6 Allen, 152. Nor to oppose division of the town. *Coolidge v. Brookline*, 114 Mass. 592. *Westbrook v. Deering*, 63 Maine, 231. Nor to pay a private fire company. *Greenough v. Wakefield*, 127 Mass. 275. Nor to build a court house. *Bachelor v. Epping*, 28 N. H. 354. Nor to build a county jail. *Drew v. Davis*, 10 Vt. 506. Nor to build a bridge in another town. *Concord v. Boscawen*, 17 N. H. 465. Nor to aid a private cemetery association. *Luques v. Dresden*, 77 Maine, 186. It cannot divide among its inhabitants money received from the state. *Hooper v.*

Town votes to
recompense
Collector for
note
accepted by him
as payment

Political, not
charitable
organization.

Cooley 17

Emery, 14 Maine, 875. Nor assess a tax to pay back money voluntarily paid into its treasury, to aid in relieving the town from military draft. *Perkins v. Milford*, 59 Maine, 315.

Within its sphere, a town may exercise some discretion as to what claims to pay, or to contest. In the matter of schools, roads, paupers, fire engines, town-houses, &c., matters which towns are created to care for, the town may determine what claims on these accounts it will pay. The claim in suit, however, arises out of matters which are not entrusted to the control of town-meetings. It concerns the collection of public taxes. The statute (R. S., c. 3, § 46) empowers a town to raise money for specified purposes, — that is, to fix and order by vote the amount to be assessed and collected for proper town charges, — but there the discretionary power of the town seems to end. The statute gives it no control over the assessment or collection of any taxes. It is true, the statute requires the town to appoint the assessors and collectors of all state, county and town taxes to be levied within its territory, but the town does this as the political agent of the state. The appointment could have been entrusted to any other agency. These officers are not corporate agents. They are public officers, owing to the public and not to the town alone, the duties imposed by statute. Only their appointment comes from the town. Their authority is from the statute, and they cannot be controlled by the town in the execution of that authority. *Desty on Taxation*, 508, 685. *State v. Wallon*, 62 Maine, 106.

No vote of the town can relieve the assessors of any part of their statute duty; nor can such vote control their action in any detail. The town cannot by vote increase, diminish or vary the duties which the tax collector owes to the public, nor relieve him in case of his neglect, except in the very few cases where the statute so provides. There is an implication, perhaps, in R. S., c. 6, § 173, that the town may relieve a collector who has made a fruitless arrest after one year. In general, the negligent collector is dealt with, not by the town, but by other public officers clothed with authority for that purpose.

The assessors are authorized by statute in certain contingencies to take his tax warrant from him. §§ 147, 149. The state, county and town treasurers may each issue his warrant of distress against a delinquent or slothful collector. §§ 151, 152, 158. All these officers proceed, not under any vote of the town but independent of it and under statute authority. It would be their duty to act, when the occasion arises, even in spite of a vote of the town. When a tax collector has once received a legal tax warrant, he becomes chargeable with the whole amount of the tax, state, county and town. He must account in money to each treasurer for the amount ordered to be paid to him. *Fake v. Whipple*, 39 Barb. 339; *Gorham v. Hall*, 57 Maine, 58. This liability is not a private debt due to the town as a corporation which the corporation may release. It is an official liability to the

discretion in town as to what claims to pay.

town can't control collector in exercise of his duties.

Power of p. cases

collector for and by amt of tax to be paid.

public, which he can acquit himself of, only by executing his warrant. If he neglects to execute his warrant, his liability to pay to the treasurers the amounts due them, is as living and binding as if he had collected the money. His payments to the treasurers are general, on account of the whole sum ordered to be paid each, and not particular, on any individual tax. His warrant commands him to pay over a certain gross amount, not any particular taxes, to each treasurer. Any money he officially pays the treasurer, he pays on account of, and to diminish this gross sum, this liability. If he be dilatory, his own money or property can be taken on a treasurer's warrant of distress, and no vote of the town can restrain the treasurer or restore the money. If he be dilatory in collecting, and voluntarily pays his own money to the treasurer without waiting for the warrant of distress to be issued, he only does his official duty, only pays what he was bound to pay, and could be compelled to pay. If no vote of the town can restrain the treasurer from compelling payment, it would seem that no vote of the town can force him to restore what has been voluntarily paid him by the collector on account of his official liability. In neither case, does the collector acquire any right to repayment from his subsequent omission to collect of the tax-payer.

Collector has no
rt of repayment

Without the execution or revocation of his warrant, the tax collector seems to have no claim in law, morals, or good conscience, either to be excused from failure to collect, or to receive out of the town treasury sums he has paid under his liability though in anticipation of collection. Such a claim on its face, whatever the particular facts, does not come within the purview of town-meetings. If a town has no power to raise money from taxes, to restore a gift voluntarily made to the town by one of its citizens, as was held in Perkins v. Milford, 59 Maine, 815, much less has it power to raise money from taxes, to restore to a public officer money he has paid to the town treasurer under an official obligation to do so.

This claim is that of a public officer to be compensated for a loss suffered by his neglect of his public duty. We nowhere find any authority for a town to make such compensation. For a town to make such compensation to a delinquent collector, or to otherwise relieve him, would be in effect abating the taxes he omitted to collect. A town has no power to abate a tax. *Cooley v. Granville*, 10 Cush. 56. The only tribunals authorized to grant abatements, are the board of assessors, and the appellate tribunal, the county commissioners. A town-meeting has no authority to review, modify or reverse the judgment of the assessors as to the persons or property to be taxed. Nor has it any authority to excuse a man from paying his tax, or to refund to him a legal tax once paid. To concede that a town can directly or indirectly abate a tax by vote in town-meeting, is to concede the power of a town to determine who shall pay taxes, and who shall be exempt, and the consequent power to place the public burdens wholly on such citizens, as the majority shall single out for that purpose.

In effect it
is a tax

11
This court has emphatically held that a town has no such power, and that the legislature cannot confer it. *Brewer Brick Co. v. Brewer*, 62 Maine, 62. If the town cannot abate the tax it certainly cannot excuse the collector from collecting it. The town cannot do indirectly what it has no direct power to do.

The agreed statement of facts does not disclose any legal excuse for the collector's failure to collect the tax in question. He had no concern with the ownership of the property, nor with the propriety of the tax. It is said in the agreed statement that the property meant to be taxed, belonged to, and was in the name of "D. Knowlton Company," a corporation, there being no such party as "D. Knowlton & Co." It is also said, however, that "D. Knowlton & Co." gave a note for the tax, and that afterward "D. Knowlton & Co." became insolvent. There must, therefore have been a party called, "D. Knowlton & Co." and it was unquestionably the same party as "D. Knowlton Company." The variation was simply in the name of the same party, and too slight to raise any question of identity. The agreed statement negatives the possibility of any other party. There was nothing in the matter of name, to hinder the collector a moment. *Farnsworth Co. v. Rand*, 65 Maine, 19. The validity of the tax was not questioned.

We cannot see any ground upon which to sustain the vote of the town directing the assessment of a tax upon its citizens to pay this claim. The law has not made town-meetings the courts of last resort in a matter so highly important to every citizen as the prompt collection of public taxes. It does not permit the bestowal of public money upon a delinquent officer, by a friendly majority in a town-meeting. The limited power of towns over public money was well stated in *Westbrook v. Deering*, 63 Maine, 231. The tax-payer is by no means at the mercy of local majorities. The law carefully guards his rights and immunities, and only permits him to be taxed for lawful public purposes. It gives the courts power to afford him ample protection against the inconsiderate unauthorized actions of towns.

Exceptions sustained.

OSGOOD v. CONWAY. 90

1891. 67 N. H. 100.

Town voted to
excuse its
expenses in
defeating a bill
introduced into
the legislature at
the January session,
1891, for a division
of the town. The
representatives of
the town employed
counsel and pro-

BILL in equity, by residents and tax-payers in Conway, against the town, its selectmen, collector, and treasurer, for an injunction restraining the defendants from assessing, collecting, or paying over money to the representatives of the town in the legislature, for the purpose of reimbursing them for expenses incurred in defeating a bill introduced into the legislature at the January session, 1891, for a division of the town. The representatives of the town employed counsel and pro-

cured the attendance of witnesses, without authority from the town, in opposition to the measure. At the annual town-meeting, held on the second Tuesday of March, 1891, after the expenses had been incurred in opposition to the division of the town, a vote was passed appropriating a sum of money to pay for those expenses.

PER CURIAM. [DOE, C. J.] It is unnecessary to consider the question whether the town, as a corporation, had the power to employ agents to represent it before a legislative committee in opposition to the proposed change in its territorial limits. If the existence of such a power is admitted, the parties who incurred the expenses in question were not the authorized agents of the town for that purpose. As representatives to the legislature they had no authority to bind the town by contract. Nor does it appear that they assumed to act in behalf of the town. As citizens of the town they were interested in the proposed legislation, and there is nothing in the reserved case indicating that they were not engaged in the defence of their individual interests. But if their services can, in any view, be said to be beneficial to the town in its corporate capacity, they were rendered gratuitously, and imposed upon it, at most, only a moral obligation to pay for them. French v. Benton, 44 N. H. 28; Butler v. Charlestown, 7 Gray, 12. The vote of the town appropriating money to pay for these services, if deemed equivalent to a promise to pay for them, did not bind the town, since it was not supported by a legal consideration. A promise to pay for services voluntarily rendered without the request or authority of the promisor is not enforceable, although they may be beneficial and valuable to him. Wilson v. Edmonds, 24 N. H. 517; Hall v. Hall, 44 N. H. 293, 296; Lebanon v. Griffin, 45 N. H. 558; Buxton v. Chesterfield, 60 N. H. 357; Kent v. Rand, 64 N. H. 45; Earle v. Coburn, 130 Mass. 596; Bartholomew v. Jackson, 20 Johns. 28.

As the town did not become legally liable to pay for the services under either an express or an implied contract, the imposition of a tax upon its citizens for that purpose would be unauthorized and illegal.

Decree for the plaintiffs.

KELSO v. TEALE. 91

1896. 106 Cal. 477.

BELCHER, C.¹ This is an appeal from a judgment of the superior court of Los Angeles county, directing the issuance of a peremptory writ of mandate commanding the appellant, as city auditor of the city of Los Angeles, to number and record a demand which had been duly approved and allowed by the board of directors of the Los Angeles Public Library.

¹ Part of the opinion is omitted.—ED.

The charter of the city of Los Angeles makes provisions for a public library, which is to be managed by five directors, known as the "board of directors of the Los Angeles Public Library." Stats. 1889, art. VIII, p. 456.

By section 86 the board is given power, among other things, to appoint a librarian and necessary assistants, and such other employees as may be necessary, to control and order the expenditure of all moneys at any time in the library fund, and order the drawing and payment of all moneys out of said fund for such expenditures and liabilities as are authorized, subject to the general provisions for the payment of demands on the city treasurer contained in article XXI, and generally to do all that may be necessary to carry out the spirit and intent of the charter in establishing a public library and reading-room.

*Public library
sent delegate to
conference
Held valid*

The demand in question was for two hundred dollars, which sum, by a resolution passed June 6, 1893, was appropriated by the board of library directors on account of the expenses of a delegate representing the library at the World's Congress of Librarians and to the American Library Association Conference, to be held from the 10th to the 24th of July, 1893.

*that
Alleged public
benefit too remote*

Appellant further contends that, under the provisions of the charter, the directors of the library had no right to make such an appropriation from the library funds as that here in question. And it is said: "The benefits to be derived by the tax-payers and patrons of the library from what might be learned by a delegate to a congress of librarians are too remote, too speculative, too chimerical, to make the expenses of such a delegate a legal charge upon the public funds."

*Qa. of benefit for
directors. ///*

But the question of benefits to the library and its patrons from an expenditure like that here involved was one to be determined by the directors in the first instance; and, if there could be any state of circumstances under which such an expenditure would be authorized, it must be presumed that such a state was shown, and was considered and acted upon by the directors when they made the appropriation. The board was authorized "to control and order the expenditure of all moneys at any time in the library fund," and "generally to do all that may be necessary to carry out the spirit and intent of this charter in establishing a public library and reading-room."

In view of the action of the board and of the court below, we cannot say that the appropriation, under the circumstances shown, was not justifiable and proper.

No other points are made, and in our opinion the judgment should be affirmed.

For the reasons given in the foregoing opinion the judgment is affirmed.

COMMONWEALTH ex REL. CITY OF PHILADELPHIA POLICE
PENSION FUND ASSOCIATION v. WALTON. 92

1897. 182 Pa. 373.

STERRETT, J.¹ In the relator's petition for the alternative writ, it avers among other things that it is a corporation, created by and existing under the laws of this state, whose objects as defined by its charter are to accumulate a fund from the dues of its members, from legacies, bequests, gifts and other sources, with which to pay pensions to members of the association and to families of deceased members; that its membership is twenty-three hundred and eighty-six (2386), including the director of public safety, the superintendent of police, all the police captains and lieutenants, two hundred and thirty-six (236) sergeants, two thousand and thirteen (2013) patrolmen, sixty-seven (67) patrol and van drivers and thirty (30) employees of the electric bureau; that it pays pensions to members who have become permanently incapacitated by reason of injuries received in the performance of actual duty, to members who have served fifteen years, whatever may be the cause of incapacity (excepting cases in which it results from the member's own vicious habits), to members who have served twenty-five years, and to the widow or children or dependent parents of a member killed in the discharge of his duty, etc.; that in 1895 an ordinance was passed by the councils of said city of Philadelphia and approved by the mayor appropriating ten thousand (\$10,000) dollars for the charter purposes of said Pension Fund Association; that in January of that year a warrant for the payment of said sum was duly drawn by the director of the department of public safety and presented to the then city controller, who refused to countersign the same; that his successor in office, — the present controller, — being unwilling to overrule the decision of his predecessor, declined to countersign the warrant; and praying that an alternative *mandamus* issue, etc.

In the city controller's return to the alternative writ all the facts recited in the petition are virtually admitted. The only reason he gives for his refusal to countersign the warrant is that the appropriation was to an association or corporation; and is in violation of law and of section 7 of article IX, of the constitution which reads thus: "The general assembly shall not authorize any county, city, borough, township or unincorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for or to loan its credit to any corporation, association, institution or individual." //

In support of the demurrer to this return the following reasons were assigned: (1) the return admits facts which show that the relator is //

¹ Arguments omitted. — Ed.

entitled to relief; (2) it discloses no legal ground for refusal to countersign the warrant, and (3) the respondent has neither set up nor offered any matter or thing to defeat the right of the relator as disclosed by its petition.

The refusal of the court below to sustain the demurrer, and the entry of judgment thereon for the defendant, constitute the subjects of complaint in this appeal.

It is unnecessary to even outline the history of the constitutional prohibition above quoted. It had its origin in the amendment of 1857, which was prompted by the growing evils of reckless and extravagant municipal subscriptions to railroads, plank roads, etc. Those evils were so aggravated that it became necessary to interfere and prevent by a constitutional prohibition all future pledges of municipal faith and property for such purposes under the sanction of the legislature, which alone possessed the power to grant the proper authority: *Railroad v. Philadelphia*, 47 Pa. 193; *Speer v. School Directors*, 50 Pa. 163; *Brooke v. Philadelphia*, 162 Pa. 126.

In *Speer v. School Directors*, *supra*, it was held "that money paid to save a community from a (military) draft is not obtained for a party or individual, but is a direct appropriation to a public purpose, and that raising money by the ordinary powers of borrowing and taxation for a common purpose, affecting the interest, happiness and welfare of a community, is not obtaining money or loaning credit to any party within the terms of the amendment."

It is evident from an examination of our cases on the subject, that no strictly legitimate municipal purpose was intended to be prohibited. The evident purpose of the prohibition was to confine the municipalities to the objects for which they were created and to restrain the legislature from authorizing any perversion of them. By the act of March 17, 1789, which appears to be still in force, the city councils of Philadelphia "have full power and authority to make, ordain and establish such and so many laws, ordinances and regulations as shall be necessary for the welfare and comfort of the city." We have no right to assume, nor is there anything from which it may be fairly inferred that the constitutional prohibition in question was intended to revoke or curtail any of the powers or authorities with which the city councils were theretofore invested by the comprehensive grant above quoted. It is not even suggested that a reasonable appropriation by councils for the creation or maintenance of a police pension fund is not an appropriation to a strictly municipal use, and "necessary for the welfare and comfort of the city." A judiciously administered pension fund is doubtless a potent agency in securing and retaining the services of the most faithful and efficient class of men connected with that arm of the municipal service in which every property owner and resident of the city is most vitally interested. Reasons in support of this proposition need not be stated in detail. They are such as readily suggest themselves in every reflecting mind.

But, aside from the general charter authority of councils to make such appropriations, and aside from any question of expediency or propriety in their doing so, this case might well be disposed of on the ground that the constitutional prohibition relied on by the defendant is inapplicable to councils. In *Indiana Co. v. Agricultural Society*, 85 Pa. 357, this court held that the section in question "deals only with legislative power. . . . That power is thereby limited and restricted. It declares what the legislature 'shall not' do. It annuls nothing that it had done. It forbids such legislation thereafter. It struck down no law. Its prohibitions were wholly prospective." It is not pretended that the ordinance in question was enacted in pursuance of any legislation passed since the adoption of the constitutional prohibition. It therefore follows that the latter has no application here.

There is no merit in the objection that councils delegated the distribution of the sum appropriated to the "Philadelphia Police Pension Fund Association," instead of distributing it themselves. If they were satisfied, as they doubtless were, that the distribution of the fund would be better effected through the agency of the association than by an agency of their own creation, they had a right to so provide. As we have seen, the association was incorporated for the express purpose of administering such funds on just and equitable principles. If it should attempt to divert any of the funds to improper purposes ample redress could be had by application to the proper court.

It follows from what has been said that the demurrer should have been sustained, and a peremptory writ awarded as prayed for.

Judgment reversed, and judgment is now entered in favor of the plaintiff on the demurrer, and peremptory writ awarded as prayed for.

COMMONWEALTH EX REL. KELLY v. PITTSBURG.

1897. 183 Pa. 202.

THE relators secured an appropriation from councils of the city of Pittsburgh for a survey for a ship canal from the Ohio River to Lake Erie. They then made contracts and expended money on faith of the appropriation. The controller refused to authorize a warrant, on the ground that the appropriation was illegal. This is a petition for *mandamus* to compel the controller to certify a warrant.¹

PER CURIAM. . . . The appropriation was a very reasonable one; and the purpose for which it was made was certainly not foreign to the material interests and general prosperity of the municipality, but quite the contrary. We are therefore of opinion there was no error in hold-

¹ This short statement is abstracted from the opinion of the lower court. An extract from the opinion of the Supreme Court only is given.—Ed.

ing that councils had the power to make the appropriation, and that good faith to the relators and others who acted in reliance thereon requires that the sum thus appropriated should be paid.

Decree affirmed and appeal dismissed at appellants' costs.

WATERS v. BONVOULOIR. 94

1899. 172 Mass. 286.

Taxpayers suit FIELD, C. J. This is a petition brought under Pub. Sts. c. 27, § 129, by ten taxable inhabitants of the city of Holyoke to restrain the defendant as city treasurer from paying money out of the treasury of the city in accordance with an appropriation of five hundred dollars, made on the recommendation of the mayor by the board of aldermen, by a vote of 16 yeas to 5 nays. The appropriation was from the contingent fund to defray the expenses of a committee consisting of the mayor and four aldermen in attending a convention of American Municipalities at Detroit, Michigan, where subjects pertaining to the administration of cities were to be discussed, and which the city of Holyoke had received an invitation to attend. This convention was under the charge of the League of American Municipalities, whose constitution provided that its objects were: "First, the perpetuation of the organization as an agency for the co-operation of American cities in the practical study of all questions pertaining to municipal administration; secondly, the holding of annual conventions for the discussion of contemporaneous municipal affairs; thirdly, the establishment and maintenance of a central bureau of information for the collection, compilation, and dissemination of statistics, reports, and all kinds of information relative to municipal government."

The charter of Holyoke is St. 1896, c. 438; the last part of § 13 of that chapter is as follows: "The board [of aldermen] shall, so far as is not inconsistent with this act, have and exercise all the legislative powers of towns and of the inhabitants thereof, and shall have and exercise all the powers now vested by law in the city of Holyoke and in the inhabitants thereof, as a municipal corporation, and be subject to all the liabilities of city councils, and of either branch thereof, under the general laws of the Commonwealth, and it may by ordinance prescribe the manner in which such powers shall be exercised. Its members shall receive no compensation for their services as members of the board of aldermen, or of any committee thereof." Section 14 is as follows: "Neither the board of aldermen nor any member or committee thereof shall directly or indirectly take part in the employment of labor, the making of contracts, the purchasing of materials or supplies, the construction, alteration, or repairs of any public works, buildings, or other property, or the care, custody, or management of the same; or

in the conduct of any of the executive or administrative business of the city, or in the expenditure of public money, except as herein otherwise provided and except such as may be necessary for the contingent and incidental expenses of the board of aldermen; nor in the appointment or removal of any officers except as is herein otherwise provided. But nothing in this section contained shall affect the powers or duties of the board in relation to city aid to disabled soldiers and sailors and to the families of those killed in the Civil War." Section 23 is as follows: "No member of the board of aldermen shall, during the term for which he is elected, hold any other office in or under the city government, have the expenditure of any money appropriated by the board of aldermen, or act as counsel in any matter before the board of aldermen or any committee thereof; and no person shall be eligible for appointment to any municipal office established by the board of aldermen during any municipal year within which he was an alderman, until the expiration of the succeeding municipal year."

The question is whether the appropriation of five hundred dollars from the contingent fund to pay the expenses of the committee to the convention of the American Municipalities at Detroit, is authorized by the general laws with reference to towns and cities, or by the charter of the city of Holyoke. Pub. Sts. cc. 27 and 28, and the amendments thereof, define the powers of towns and cities, and city councils. The appropriation shown in the present case is not for the payment of "necessary charges" within the meaning of Pub. Sts. c. 27, § 10. Necessary charges are confined to matters in which a town or city has a duty to perform, an interest to protect, or a right to defend. *Minot v. West Roxbury*, 112 Mass. 1. *Coolidge v. Brookline*, 114 Mass. 592. *Spaulding v. Peabody*, 158 Mass. 129. *Swift v. Falmouth*, 167 Mass. 115.

Pub. Sts. c. 28, § 13, is as follows: "The city council of a city may, by a ye and nay vote of two thirds of the members of each branch thereof present and voting, appropriate money, not exceeding in any one year one fiftieth of one per cent of its valuation for the current year, for armories for the use of military companies, for the celebration of holidays, and for other public purposes." It is contended that the appropriation shown in the present case is for "other public purposes," within the meaning of this section of the statutes. The appointment of a committee "to represent the city of Holyoke at the Convention of American Municipalities to be held at Detroit, Mich., from August 1st to 4th, inclusive," does not seem to be for any distinct public purpose within the meaning of the charter of the city or of the general laws. The purpose apparently is to educate the committee generally with reference to all questions pertaining to municipal administration anywhere. It is not confined to the ascertainment of facts for the information of the board of aldermen of the city of Holyoke concerning questions actually pending before the board. There is nothing in the statutes of the Commonwealth which authorizes the city



of Holyoke to become a member of the League of American Municipalities, and the attendance of a committee made up of the mayor and certain members of the board of aldermen upon any meeting of that League is for the purpose of listening to or taking part in general discussions concerning municipal administration. The general education of the mayor and aldermen upon all matters relating to municipalities in the United States and Canada is not, we think, a public purpose, and cannot be paid for out of the funds of the city. An injunction should be issued as prayed for.

So ordered.

JAMES v. SEATTLE. 95

1900. 22 Wash. 654.

REAVIS, J.¹ In October, 1898, the city council of Seattle passed an ordinance providing, "that a special committee consisting of the whole membership of the city council, or so many members as may be able to serve, and such executive officers as may be chosen by the city council, be and hereby are appointed to visit the cities of Duluth, West Superior, St. Paul and Minneapolis, Minn., Great Falls, Mont., Spokane, Wash., and such other cities as may be deemed advisable by said committee, for the purpose of securing information upon the matters referred to in the preamble of this ordinance." The matters referred to in the preamble were "waterworks, street paving, street lighting, terminal facilities, and other municipal matters which are now, and constantly will be, coming before the legislature and executive departments for consideration." The appellant, with other members of the city council and some other city officers, in October, 1898, visited St. Paul, Minneapolis, Duluth, West Superior, and Spokane, for the purpose of investigating and securing information concerning the matters mentioned in the preamble of the ordinance, and made necessary expenditures for his transportation, board, and lodging. In November, 1898, he filed with the secretary of the auditing committee his claim against the city for such expenditures. The claim was duly and regularly audited, reported to the council and approved, and an ordinance adopted directing a warrant to be drawn for appellant's claim, with others, and appropriating money from the general fund to pay the same. The warrant was drawn in appellant's favor for the amount, and signed by the mayor. But the respondent Parry, city comptroller, refused to countersign the same, and the defendant city refused to deliver the warrant to appellant. The suit was brought to procure a peremptory writ of mandate to compel the respondent Parry, as city comptroller, to countersign and to compel the

¹ Arguments omitted. — Ed.

city to deliver to plaintiff the warrant. The respondents demurred to the affidavit for the writ on the ground that it does not state facts sufficient to constitute a cause of action, or to entitle plaintiff to the relief therein prayed for. The demurrer was sustained, and the appeal is from the order sustaining the demurrer and the judgment entered in favor of respondents.

It is urged here by counsel for appellant that the comptroller is a ministerial officer and has no discretion in the discharge of his duties. The city charter provides that he shall countersign all warrants upon the treasury. Several authorities are cited to support appellant's contention. The case chiefly relied upon is that of *McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53. In that case the plaintiff applied for a writ to compel the city clerk to issue a warrant for a claim for expenses incurred by him in procuring, at the request of the city, through the trustees thereof, counsel and legal services for the city. The bill was approved by the trustees and ordered paid. One of the defenses set up by the clerk was a denial of the indebtednesses. With reference to this the court observed:

"The law has not constituted the clerk either the guardian of the board of trustees or an appellate court to pass upon the facts once decided by the board. The claim was one which the board of trustees had jurisdiction to hear and determine. Such determination was a judicial act, and involved a determination of the fact of indebtedness, and when so determined, whether right or wrong, its action was binding upon the clerk."

Counsel maintains that the subject of waterworks, street paving, street lighting, terminal facilities, and other municipal matters comes within the control of the city council, and that members of the council are bound to use their best endeavors in behalf of the tax-payers, by giving them the best results in the most economical manner, and that it is the duty of councilmen to inform themselves concerning all matters which come before them, that they may act intelligently for the benefit of the city. It is true, the members of the city council owe the public duty to the city to exercise their best faculties in its interest. The compensation of a member for his official duties as councilman may be determined and fixed, and cannot be changed during his incumbency of office. If the members of the council, upon their tour of inspection, were in the discharge of their official duties, the restriction upon additional compensation applies. *Takoma v. Lillis*, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372.

The only ground, then, upon which compensation could be sustained, would be that of necessary expenses incurred in the performance of official duties. Necessary expenses must be such as are strictly essential to municipal purposes. This principle is well established. 1 Dillon, *Municipal Corporations* (4th ed.), §§ 89-91; 19 Am. & Eng. Enc. of Law, 541.

Judge Cooley, in his work on Taxation, p. 209, observes:

"In the construction of any grant of the power to tax made by the state to one of its municipalities, the rule which is accepted by all the authorities is, that it should be with strictness. The reasonable presumption is held to be, that the state has granted in clear and unmistakable terms, all it has intended to grant at all; and whatsoever authority the municipal officers assume to exercise, they must be able to show the warrant for in the words of the grant."

And we think the rule thus announced is the established one, and in consonance with all sound authority. The members of the city council are trustees. The body holds a trust for the inhabitants of the city. The terms of the trust are fixed by legislation, and no expenditure of money belonging to the city can be made without express authority, or implied authority by reason of a necessary granted power. Where this authority does not exist, the council is without power to authorize the payment of the claim against the city; and, upon sound principle, it cannot be conceded that the council had the power to authorize the payment of the claim of appellant.

To the objection that the comptroller cannot defend against the suit, it is sufficient answer that the other principle has been established by this court. *Chalk v. White*, 4 Wash. 156, 29 Pa. 979. Where the council is without power to authorize the payment of the claim, the officer may properly refuse to countersign the warrant directing the payment of such claim.

The judgment is affirmed.

DUNBAR, C. J., and FULLERTON, J., concur.

ANDERS, J., not sitting.

POTTS v. CAPE MAY.

1901. 66 N. J. Law, 544.

Fort, J. The writ in this case brings up two resolutions of the city council of the city of Cape May.

The first, adopted November 23d, 1899, reads as follows:

"Whereas, we, the city council assembled, feel that the city of Cape May has not or is not properly represented in an advertising or general way, and we think it is very important that our city, as a resort, be placed before the people at large; now therefore, be it

"Resolved, That Mr. L. E. Miller be appointed to represent this city, with the understanding that no contracts shall be made whereby the city be obligated without first the consent of this council."

The second, adopted August 7th, 1900, reads as follows:

"Resolved, That the city solicitor is instructed and hereby authorized to make the best possible compromise with Lemuel E. Miller for his claim against the city."

"... up case. all other res. are
J. C. E. J."

Mr. Miller seems to have entered upon the duties designated in the resolution adopted November 23, 1899, and he subsequently, it appears by the record, presented a bill against the city for services, upon which, it not being paid, suit has been instituted.

It was this claim in suit which the resolution of August 7, 1900, authorized the city solicitor to compromise.

The prosecutors are residents and tax-payers, and challenge the power of the city council to pass the resolution in question, or to incur expenses of the character indicated. It is conceded that no statute expressly confers upon the city council the power to appoint Miller for such a purpose. The city of Cape May is incorporated by a special charter enacted in 1875. Pamph. L., p. 206.

It is undisputed that the city charter does not authorize the appointment of Mr. Miller, unless the authority can be gathered or implied from the language of sections 9 or 20, or both.

That there is no implied power in a municipal council to employ persons to do work outside of duties germane to city government cannot be questioned. It is equally true that municipal powers are to be strictly construed, and where doubtful held not to exist. 1 Dill. Mun. Corp., §§ 89, 91; *Willard v. Killingworth*, 8 Conn. 247; *Mayor v. Yuille*, 8 Ala. 187; *Minturn v. Larue*, 28 How. (U. S.) 435; *Ottawa v. Carey*, 108 U. S. 110.

Is there anything in section 9 or the other provisions of the city charter broad enough to be held to cover the engagement of a person to advertise the city, in a general way, "as a resort before the people at large"?

Section 9 of the city charter authorizes the appointment of "such other and all subordinate officers of the said city," whether named in the act or not, as "may, in the opinion of the city council, be necessary for the better ordering and governing the said city, for the preservation of its health, or for the convenience, safety and advantage of commerce and trade."

In connection with this section of the charter another clause should be quoted, and that is the last clause of section 20, which declares that "the city council shall have power to make and establish such ordinances, regulations, rules and by-laws . . . as they may deem necessary and proper . . . for the prosperity of the said city and its inhabitants, and the same to alter, modify and repeal."

We do not think the provisions of the city charter, above quoted, are broad enough to cover an engagement of a party to perform the services indicated by the resolutions brought up by the writ and the bill of Mr. Miller as presented to the city council, as found in the record.

The items of the account rendered by Mr. Miller clearly demonstrate that the duties he did, and which evidently he thought he was engaged to perform, consisted in going to Philadelphia and entertaining persons there, and at Cape May, at dinner and the like. The dinners being

*Whether city
can compromise such
claim*

*Sec. 9.
Power to appoint
"such"*

*Sec. 20
"as they may deem
necessary and proper"*

*That the city
may not
be bound by
the resolutions*

Nature of duties

given to persons whom he might think able to "boom" the city, or bring custom to it by way of shortened or speedy transportation.

The evidence would seem to indicate that the chief efforts of Mr. Miller were directed to securing advantages for the Cape May and New Jersey Coast Steamship Company, in which he either was then or very soon after largely interested, as his testimony shows.

The power to appoint city officers in the ninth section gives authority to appoint as city officers only such officers as "may be necessary for the convenience, safety and advantage of commerce and trade." That means commerce and trade within the city — the regulation and direction of commercial affairs within the city; such officials as may be necessary within the city to promote convenience, secure safety and be to the advantage of commerce and trade of the inhabitants. Nor do we think that the general welfare clause in the twentieth section of the charter, which permits the city to adopt regulations, &c., for the "prosperity of said city and its inhabitants," furnishes authority to engage a man for the purposes for which Mr. Miller was engaged. The twentieth section only authorizes the employment of officials "for the preservation of the public health and prosperity of said city and its inhabitants." This clause cannot be extended to embrace officers, as city officials, who are to be engaged in matters entirely aside from city duties, within the purview of the city government.

If it is within the power of a city council, under a general welfare clause of this character, to appoint and pay an officer to travel, advertise and canvass for custom and sojourners, it is equally within their power to engage in various enterprises which they may think will bring advantage, by way of commerce or trade, to the city.

Such powers will never be inferred; if they are found to exist it must be because of some express provision of the city charter by which they are clearly conferred.

The resolutions brought up are ultra vires the municipality and are set aside.

MATTER OF CHAPMAN v. NEW YORK.

1901. 168 N. Y. 81.

97

VANN, J. The statute under which this proceeding was instituted provides for the appointment of a referee "to hear, examine into and report" the amount of reasonable counsel fees and expenses paid or incurred by a city or county officer in successfully defending himself in any trial or proceeding "to remove him from office or . . . to convict him of any crime" alleged to have been committed "in the performance of or in connection with his official duties," and that the amount allowed by the referee, when confirmed by the court, be paid by the issue of revenue bonds to be included in the taxes levied for

1. provided for payment of fees & expenses of in successfully defending self.

the following year in the city or county affected. L. 1899, ch. 700. Another part of the act provides for the payment of similar claims by the state; but, as the validity of that part is not involved in this appeal, no further allusion need be made to it.

While other questions have been discussed before us, the main question is whether the legislature had power, under the Constitution of our state, to pass this statute. That question has been passed upon several times by the Supreme Court, and the conclusion reached by every judge who considered it is that the statute is unconstitutional. *Matter of Straus*, 44 App. Div. 425; *Matter of Jensen*, 28 Misc. Rep. 379; *affd.*, 44 App. Div. 509; *Matter of Chapman*, 57 App. Div. 582; *Matter of Fallon*, 28 Misc. Rep. 748; *Matter of Labrake*, 29 Misc. Rep. 87. Our examination has led us to the same result, and, as the discussion of the subject has been so thorough and able in the courts below, it is necessary for us to do little more than announce our conclusion.

It is unan.

In a case which arose under the Constitution of 1846 before it was amended, expressions were used by learned judges of this court which went beyond the requirements of the decision they made. *Town of Guilford v. Bd. of Supers.*, *Chenango Co.*, 13 N. Y. 148. All that was actually decided was that the legislature had power to require a board of supervisors to assess upon the taxable property of a town the amount which highway commissioners had been compelled to pay for costs in an action commenced by them pursuant to the direction of the voters of the town. The payment of such a claim was not an act of charity, as it rested on a strong moral obligation. It was, however, declared in one of the opinions that "the Legislature has the right to appropriate the public moneys for local or private purposes, and to impose a tax upon the property of the whole state or any portion of the state, or any particular or specified kind of property." In another opinion it was said: "The Legislature is not confined in its appropriation of the public moneys or of the sums to be raised by taxation in favor of individuals to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice in the largest sense of those terms or in gratitude or charity." Subsequent cases, following the *dicta* rather than the decision, led to results which, as it is said, induced the people in 1874 to amend the Constitution by adding sections ten and eleven to article eight. Section 11 was amended in 1884 by adding further provisions, and the substance of both sections appears in the revised Constitution of 1894. Art. 8, sections 9, 10. Section nine is not now important, as it relates to the giving or lending of the credit or money of the state, but section ten makes it a part of our fundamental law that "no county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, . . . nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes."

Against.

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1) It has been held that this provision does not prevent the legislature from authorizing the payment by a municipal corporation of a claim which, although it could not be enforced by the courts, is founded in justice, supported by a moral obligation, and could have been legally created if the proceedings of the local authorities had been regular. *Wrought Iron Bridge Co. v. Town of Attica*, 119 N. Y. 204-211. So it may be argued that payment of a claim otherwise valid, but against which the Statute of Limitations had run in favor of a municipal corporation, or of one for money expended or services performed for the benefit of a city without lawful authority, might be authorized or required by the legislature. *New Orleans v. Clark*, 95 U. S. 644; *Friend v. Gilbert*, 108 Mass. 408; *Brewster v. City of Syracuse*, 19 N. Y. 116; *Brown v. Mayor, etc., of N. Y.*, 63 N. Y. 239; *Mayor, etc., of N. Y. v. Tenth Nat. Bank*, 111 N. Y. 446. If a legal liability to pay once existed, but has been suspended or barred in some technical way short of substantial satisfaction, a moral obligation to pay still exists, which is recognized both by statute and common law. Code Civ. Pro. section 395; *Tebbetts v. Dowd*, 23 Wend. 379-382; *Buswell's Stat. of Lim.* section 36.

2) In the case before us, however, no benefit was conferred upon the city, and there was never a legal or moral obligation on the part of the city to pay the claim in question. For time out of mind, in all governments where the common law prevails, a person prosecuted for crime has been compelled to pay his own expenses when he had the means of doing so. *People ex rel. Brown v. Bd. of Supers., Onondaga Co.*, 4 N. Y. Cr. Rep. 102; affirmed, 102 N. Y. 691. If without means, the counsel assigned by the court served without pay, except under a recent statute a moderate allowance may be made in a capital case. L. 1897, ch. 427; Code Cr. Pro. section 308. This exception is founded on the theory that a fair trial cannot be had without the aid of counsel, and that money paid from public funds to counsel appointed by the court for a prisoner without means, is paid for a public purpose. The proceeding instituted against the appellant was not a prosecution for crime, but to discipline or remove him for misconduct as a public officer. There was no authority, statutory or otherwise, to appoint counsel to defend him, and no attempt was made to do so. It was necessary for him to employ and pay his own counsel, as has always been the case with others similarly situated. Payment of his expenses by the public would be a mere gratuity, and without the sanction of custom or precedent. There was no moral obligation on the part of the respondent to discharge such a claim, for it had no foundation in natural or legal right. It is not the duty of the public to defend or aid in the defense of one charged with official misconduct. The history of morals or jurisprudence recognizes no such obligation. When a citizen accepts a public office he assumes the risk of defending himself against unfounded accusations at his own expense. Whoever lives in a country governed by law assumes the risk of having to defend him-

self without aid from the public, against even unjust attempts to enforce the law, the same as he assumes the burden of taxation. As was said in *Matter of Jensen, supra*, it is "a part of the price he pays for the protective influence of our institutions of government." Asking for aid to pay the expenses of a defense already made from one's own resources, is like asking for aid in the payment of taxes or the discharge of any public burden. It is not a city or county purpose, but a mere gift.

The courts have found it difficult to define a county, city, town or village purpose, and have, as a rule, proceeded by the process of exclusion. *People ex rel. Murphy v. Kelly*, 76 N. Y. 475-487; *Matter of Mayor, etc., of N. Y.*, 99 N. Y. 569-585; *Matter of Niagara Falls and Whirlpool Ry. Co.*, 108 N. Y. 875-885.

In *Sun Printing & Publishing Association v. Mayor, etc., of N. Y.*, 152 N. Y. 257-265, the following general definition was laid down: "The purpose must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character and authorized by the legislature."

In *Bush v. Bd. of Supers., Orange Co.*, 159 N. Y. 212-217, it was declared in substance that the payment of a claim "which there was no legal or moral obligation on the part of" a town to pay, is not a town purpose, and "is in conflict with the provision of the Constitution . . . which forbids the town from giving any money to or in aid of an individual."

In *Matter of Greene*, 166 N. Y. 485-494, the court alluded to "the distinction between the gratuity which the Constitution now forbids and the meritorious claim which it permits municipal bodies to satisfy." In *Bd. of Supers., Cayuga Co. v. State*, 153 N. Y. 279-293, which involved the validity of an act providing for the reimbursement of a county by the state for the expenses of trials for crimes committed in a state prison, it was held that such provision "was not a gift of money by the state, but was intended as a discharge of an equitable obligation, although unenforceable, which, in the judgment of the legislature, rested upon the state."

In *Roberts v. State*, 160 N. Y. 217, no definition was attempted, but the doubt expressed on page 224 is not without significance.

As a city purpose is of necessity a public purpose, limited or applied to a city, the definition of a public purpose by the Supreme Court of the United States, in an important case, is worthy of careful attention. That learned court declared that "there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear, and the reason for interference cogent.

And in deciding whether in a given case the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people, may well be held to belong to a public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." *Loan Association v. Topeka*, 20 Wall. 655-664. See, also, *Dillon Mun. Corp.* [4th ed.] sections 75, 76; *Cooley's Const. Lim.* [5th ed.] 283, 286; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1-44.

Tested by these definitions, and we find none more liberal, payment of the appellant's claim, which arose nearly three years before the statute in question was passed, is not a city or county purpose. His defense was for his own benefit, not for the benefit of the city. It was a private matter of his own, the same as if he had been sued by the city in an action at law, and had succeeded in his defense. As we have seen, there was no legal liability or moral obligation on the part of the city to pay his expenses, which were not necessary for the common good and general welfare of the municipality, nor public in character, nor, so far as appears, sanctioned by its citizens. It was in no sense a meritorious claim from the standpoint of public interest or good government, nor one the payment of which is sanctioned by the history of legislation or the acquiescence of the people. He made an unprecedented demand, and its novelty, when the numerous opportunities for the presentation of such claims for time out of mind are considered, is almost a demonstration that it was not incurred for a public purpose. While vast numbers of people during the history of the state have had claims similar in principle, seldom, if ever before, has one been bold enough to ask for legislation such as that under consideration.

While we are always reluctant to interfere with an act of the legislature, the command of the Constitution is supreme, and we are compelled to obey it by adjudging that the statute in question, in so far as it authorizes the payment of the appellant's claim from the funds of the respondent, is unconstitutional and void. *Weismer v. Village of Douglas*, 64 N. Y. 91.

The order appealed from should be affirmed, with costs.

Order affirmed.

HIXON v. SHARON. 98

1905. 190 Mass. 347.

Protection of prop.

KNOWLTON, C. J. This is a petition brought by ten tax-payers of the town of Sharon, to enjoin the payment of money by the town treasurer, under a vote of the inhabitants of the town as follows: "That the town reimburse the tree warden the amount incurred in defence of the trees in the village square being used as guide posts, and \$125 be appropriated for the purpose." The facts reported as the foundation of the vote are that the tree warden and deputy tree warden of the town undertook to prevent the use of certain trees in the highways and public square for the support of guide boards. A suit was brought by the town against these officers which is reported as Sharon v. Smith, 180 Mass. 539. They incurred expense in defending the suit, and the decision of the court was against them. The town having passed this vote for their reimbursement, the question is whether the vote was valid.

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It may be assumed that the warden and his deputy acted in good faith in the performance of what they thought to be a public duty. They were charged with the general care of the shade trees in the public ways of the town. A suit was brought against them, founded on their official action, and it is found that they expended in the defence of this suit more than the sum now appropriated. An expenditure incurred in good faith in this way may properly be reimbursed by a town, provided that the town has a corporate right, duty or interest in the matter in respect of which the official mistake was made. *Nelson v. Milford, 7 Pick. 18. Bancroft v. Lynnfield, 18 Pick. 566. Babbitt v. Savoy, 3 Cush. 530. Fuller v. Groton, 11 Gray, 340. Lawrence v. McAlvin, 109 Mass. 311.* The cases in which it is held that a town cannot expend money to reimburse its officers or agents for losses are those in which the expenditure relates to objects concerning which it has no duty to perform, no interest to protect, and no right to defend. *Vincent v. Nantucket, 12 Cush. 103. Flood v. Leahy, 183 Mass. 232.*

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Under our statutes towns have an interest in the shade trees in public places. They may make appropriations for planting shade trees in the public ways. R. L. c. 25, § 15. The officers having the care of public ways may authorize the planting of trees in them by individual landowners. R. L. c. 53, § 6. Trees in the public ways in cities cannot be cut down or removed against the determination of the mayor and aldermen. R. L. c. 53, §§ 7, 8. Regulations of the tree warden for the care and preservation of shade trees must be approved by the selectmen. R. L. c. 53, § 12. Statutory penalties for injury to or unlawful interference with shade trees go to the use of the town.

F. J. v. p. 11

R. L. c. 53, § 13; c. 208, § 102. These statutes, and others, give towns an interest in shade trees in the public ways which warrants the expenditure of public money for their protection and preservation. Although the tree warden and his deputy were mistaken in their view of the law, their action, presumably, was intended for the protection of the trees, and in this respect for the benefit of the town.

We must assume that the voters in town meeting took this view of their official action, and accordingly the vote is valid.

Petition dismissed.

LEONARD v. MIDDLEBOROUGH. 99

1908. 198 Mass. 221.

not of law MORTON, J. The town of Middleborough voted no license in regard to the sale of intoxicating liquors in the year 1903, and appropriated at the annual meeting in that year \$500 to employ counsel and prosecute the illegal sale of intoxicating liquor in the town. One Greene, a special police officer, was duly appointed by the authorities of the town a committee to have charge of the money so appropriated. He and one Luippold, a constable of the town, arrested or caused to be arrested one O'Hara for illegally transporting intoxicating liquors into the town, and for bringing intoxicating liquors into the town with intent to sell the same. O'Hara was acquitted on both complaints, and afterwards sued Greene and Luippold for malicious prosecution and false arrest. Greene and Luippold were put to expense in defending the action, and, at the annual town meeting held in March, 1907, under an article in the warrant to see if the town would vote to reimburse Greene and Luippold for the money expended by them in defending the action brought by O'Hara, the town voted to expend \$200 therefor. Thereupon this petition was brought under R. L. c. 25, § 100, by more than ten taxpayers of the town of Middleborough to restrain the payment of the money so voted. The case was heard upon agreed facts and the presiding justice ordered the petition to be dismissed and reported the case to this court. If the town had no right to appropriate the money, a permanent injunction is to issue; otherwise the petition is to be dismissed.

Towns cannot raise and appropriate money except for the purposes for which, within the scope of the Legislature's constitutional powers, they are expressly or by fair implication authorized by statute to raise and appropriate it. This results from the nature of and limitations upon their powers in our scheme of government. There is no express provision authorizing towns to raise and appropriate money for such a

no express provision

purpose as that for which the money was appropriated in the case before us. R. L. c. 26, § 21, in relation to the indemnification of police officers and firemen, applies to cities and not to towns. But the statute giving towns power to appropriate money provides that, in addition to the cases therein specified, towns may raise and appropriate money "for all other necessary charges arising in such town." R. L. c. 25, § 15. This has been construed to authorize a town to raise and appropriate money in respect to matters where it has a corporate duty, right or interest to perform, defend or protect. *Hixon v. Sharon*, 190 Mass. 347. *Flood v. Leahy*, 183 Mass. 232. *Vincent v. Nantucket*, 12 Cush. 103. The question, then, is, whether the town of Middleborough had such a corporate right, duty or interest in regard to the enforcement of the law concerning the sale of intoxicating liquors within its limits, as to warrant it in appropriating money to indemnify a special police officer and a constable who had been subjected to expense by reason of an action brought against them in consequence of complaints made by them for the purpose of enforcing the law. We think that it had.

Under the present system in regard to the sale of intoxicating liquors in this State, the question whether such liquors shall or shall not be sold in any city or town is wholly one of local determination. This is on the ground that the matter is supposed to be best dealt with as one of local concern, and that the citizens of such city or town have a special and peculiar interest in it and should therefore be left to decide it for themselves, as in the case, for instance, of what roads or streets they will have. This of itself, in view of the way in which cities and towns are or may be affected, would seem to give a town such a corporate interest in the enforcement of the law as to warrant the appropriation in question. But in *Dunn v. Framingham*, 132 Mass. 436, it was held that selectmen acted in the enforcement of the law relating to the sale of intoxicating liquors, not as public agents, but as agents of the town, and a vote appropriating \$700 for the enforcement of the liquor law, and authorizing the selectmen to employ agents and counsel, was held valid. The reasoning of the court proceeded on the ground, though it is nowhere so stated in terms, that the town had a corporate interest in the enforcement of the law. Amongst other things that were said, reference was made to the fact that, in case licenses were granted in a town, the town would take the larger part of the license fees for its own use, showing that the towns were regarded by the court not merely as political divisions, but as having corporate interests of their own in the enforcement of the law. So far as appears from an examination of the papers in that case, no licenses had been granted by the town, and the case must be regarded, we think, as decisive of this. If the town had a corporate interest to protect, and the voters deemed that the action of Greene and Luippold was intended to benefit the town, it is settled that the town had a right to indemnify

them even though they were mistaken in their view of the law and the facts in regard to the complaints which they made. *Hixon v. Sharon, supra.* It does not appear that they did not act in good faith. It is not contended that the vote appropriating \$500 to employ counsel and prosecute the illegal sale of intoxicating liquors was invalid. The result is that the bill must be dismissed.

Bill dismissed.

ATTORNEY GENERAL EX REL. MAGUIRE v. WAYNE
CIRCUIT JUDGE. 150

1909. 157 Mich. 615.

BROOKE, J. On the 9th day of February, 1909, the common council of the city of Detroit passed the following resolution:

"Resolved, That the sum of five thousand dollars be and is hereby appropriated from the moneys in the contingent fund and placed at the disposal of his honor, the mayor, to investigate the street railway question of the city of Detroit; and the city controller be and he is hereby directed to pay any bills presented and approved by his honor, the mayor, out of said appropriation."

On the 12th of February, 1909, the attorney general, on the relation of Matthew J. Maguire, a resident citizen and tax-payer of the city of Detroit, filed a bill of complaint in the circuit court of Wayne county for the purpose of securing an injunction against the common council of the city of Detroit, "from authorizing the city controller to issue his warrant or any warrant upon the said city treasurer of the said city of Detroit for the payment of said sum of \$5,000 or any part thereof, for the payment of any bill or expense of the said committee of 50 out of said contingent fund or any fund of the city of Detroit, or bill or expense incurred or to be incurred by the said mayor under said resolution of February 9, 1909, or any similar resolution theretofore or hereafter adopted by the said common council;" for an injunction against the mayor "from approving said resolution adopted by the common council of Detroit on February 9, 1909, and that he be temporarily and perpetually enjoined from approving any bill or expense under and by virtue of said resolution, and for expending any sum which may be paid to him under and by virtue of said resolution of February 9, 1909, in the payment of any bill or expense incurred and to be incurred by the said committee of 50, and in the event of any or all of said appropriation of \$5,000 having been paid to him, the said mayor, that he be temporarily and perpetually enjoined from paying or expending said money so collected by him for any purpose whatever, and that he be ordered, adjudged, and decreed by this court, if any of said money

has been paid to him, to account for and turn back into the treasury of the city of Detroit the same;" against Frank E. Doremus, city controller, "from issuing his warrant or any warrants upon the city treasurer of the city of Detroit for the payment of said sum of \$5,000, or any part thereof, as provided for in said resolution of February 9, 1909, for the liquidation of any bill or expense, presented and approved by the mayor of Detroit, under said resolution of February 9, 1909, out of said contingent fund or any fund of the city of Detroit, and from making and issuing any warrant upon the said treasurer for payment of any bill presented and approved, the purpose of which being to defray any bill or expense of the said committee of 50;" against Max C. Koch, city treasurer of the city of Detroit, "from paying out any money from the contingent fund or any other fund of said city upon any warrant or warrants executed by the city controller under and by any virtue of the resolution adopted by the common council of the city of Detroit on February 9, 1909, hereinbefore set forth."

The bill of complaint avers, among other things, that the mayor of the city of Detroit has assumed to create a so-called "committee of 50," composed of private individuals unconnected with the administration of the city government and not authorized or created by the Constitution of the State or any law of the State, for the purpose of acting with the mayor in investigating the street railways of said city and their rights in and to the streets therein, with the view of advising the mayor and common council as to what action should be taken in reference thereto. The city by its answer admitted the passage of said resolution, and appointment of the committee of 50 by the mayor, and its purpose to use the fund appropriated by said resolution in defraying the expenses incurred by said committee in investigating the street car question in the city of Detroit. Further answering, it avers:

"That the city of Detroit is a city covering many miles of territory with a population, to wit, 400,000 inhabitants. That in the year 1862 certain rights were granted in the streets in the city of Detroit to certain gentlemen who afterwards organized the Detroit City Railway Company. That in the year 1879 these rights were extended for a period of 30 years. That these grants by the city of Detroit were made under the laws of the State of Michigan. That on the 14th day of November, 1909, the period of extension granted in the year 1879 will have been completed. That for a number of years the street railway question has agitated the public mind, and has been the subject of discussion in political campaigns. That these defendants are informed and believe that the character of the population, the manner in which the city has been built, is such that street railway service is essential in order to accommodate the people from day to day. That it is necessary to take steps to continue the street car service. That the city of Detroit as a municipality is powerless to engage in this enterprise itself, and that it is incumbent upon the officers of the city of Detroit to

make an investigation and ascertain, if possible, upon what terms and upon what conditions the city may continue to enjoy street railway facilities. And that the expenditure of money for this purpose is the expending of money for a public purpose."

The answer denies that it was the purpose of the common council to deprive itself of the right to audit and allow the various items of expense according to the usual manner, but concedes that it is the purpose to defray the proper expenses of the committee of 50 in and to the investigation of the street car question. An order to show cause was issued by the circuit court for the county of Wayne, upon the return of which a preliminary injunction was denied. The case is here on an application for *mandamus* to compel the circuit judge to issue the injunction prayed for in the bill.

There being no final order or decree in this case, and the writ sought being a discretionary one, it might readily be determined that the relief prayed should be denied without a consideration of the merits. See *Kelsey v. Wayne Circuit Judge*, 120 Mich. 457 (79 N. W. 694); *George N. Fletcher & Sons v. Alpena Circuit Judge*, 136 Mich. 511 (99 N. W. 748). But inasmuch as the matter presents a question of unusual importance, and as the denial of the temporary writ is in effect the denial of all the relief sought in the bill, we will consider the case as if it were here on appeal from a final decree.

Three objections to the action of the city are urged by the complainant:

- (1) That the resolution was too vague.
- (2) That it was unlawful to expend the money for this purpose.
- (3) The resolution seeks to appropriate moneys out of the contingent fund to defray expenses which are not contingent.

We do not think that the first objection urged by the petitioner is tenable. It is a well-known fact, of which the court may take judicial cognizance, that the investigation of the street railway question involves a vast amount of inquiry in many directions. The physical value of the property of the railway company now upon the streets of the defendant city where franchises are soon to expire, the necessity to provide for the present and future demands of the city by additional trackage, the proper and remunerative rate of fare to be charged for the service to be rendered, the proper control of such service and the making of it adequate, a just and equitable system and rate of taxation, together with many other matters which are clearly of the highest importance to the city of Detroit, but could scarcely be enumerated, all of which, however, are clearly within the expression "to investigate the railway question." It may be supposed that the common council used the general language for the purpose of allowing such freedom as the character of the subject and the necessities of the situation might thereafter properly develop.

As to the other point raised, we conclude that there was no such

Resolution not too vague.

knowledge on the part of the city at the time the budget of 1908 was passed upon by the common council and the board of estimates as to make it improper or unlawful for this appropriation to be made from the contingent fund. It is, as stated by the complainant, true that the city of Detroit knew in 1908 that certain of the franchises of the Detroit United Railway would expire in November, 1909; but the exact manner in which it might thereafter be determined wise to enter upon an investigation of the rights and duties of the city and the railway company as to each other could not have been known. The contingent fund, as its name implies, is one designed for the purpose of giving elasticity to the finances of a municipality and to provide for emergencies such as may arise, a fair example of which is afforded by the case at bar.

The most important question, however, and the one which has given us most trouble, is that which arises from the placing of the money in the hands of the mayor for the designated purpose, but concededly and notoriously to be used by him in the defraying of the expenses incurred by a body of men sustaining no official relation to the city of Detroit, and being responsible to no one for the proper and honest discharge of the obligation it has assumed. A consideration of these facts at first seems to present insuperable obstacles to the carrying out of the project as designated by the common council; but upon further reflection it would seem that the action may be sustained upon broad grounds of public policy. The history of the case discloses the fact that the common council originally passed a resolution placing the fund in question at the disposal of the committee itself, but, upon advice of the corporation counsel, rescinded that resolution and passed the one here in question. There is no doubt that the common council by a committee of its own body could employ and properly compensate experts for the gathering and placing before the council all information absolutely necessary to enable it to intelligently execute the trust reposed in it by the municipality, with reference to this most important question. By its action in the present case we are disposed to the conclusion that it has said in effect that it desires for its guidance information to be gathered by experts selected by and under the direction of the committee. In other words, it has merely entered into a contract with those experts upon the advice and recommendation of a committee of gentlemen in whose judgment it has confidence.

The subject of the right of a municipality to deal with matters of purely local moment in the manner dictated by the judgment of its properly constituted authorities has been before this court on more than one occasion. In the case of *Attorney General v. City of Detroit*, 26 Mich. 264, it is said:

"It is the unwarranted use of the money that justifies the interference, and the pretense upon which it was raised is not important to the question of jurisdiction. . . . It should appear that the public has

Prohibit
Contingent fund

Public purpose

11

equivalent

a substantial interest in the question; the right involved should be a public right, or at least not a private right merely; the wrong done or attempted, if it consist solely in a misuse or misappropriation of funds, should be either one involving questions of public policy, or, where that is not the case, the amount involved should be something more than merely nominal."

In *Torrent v. Common Council of Muskegon*, 47 Mich. 115 (10 N. W. 182, 41 Am. Rep. 715), it is said:

"But in saying this we do not assume that it belongs to this court, or any other, to dictate to the city how it shall spend its money. The council must use its own discretion where it will save and where it will spend; and the case must be a very clear one, and the subterfuge very plain, before that discretion can be regarded as having been exceeded so as to show an excess of power under a pretense of keeping within it. It is not the business of courts to act as city regulators, and, unless the authority of the representatives of the citizens has been exceeded, their action cannot be interfered with merely because it may not seem to other persons to be as wise as it might be."

In *City of Port Huron v. McCall*, 46 Mich. 565 (10 N. W. 28), the court, through Mr. Justice COOLEY, spoke as follows:

"There is a principle of law that municipal powers are to be strictly interpreted, and it is a just and wise rule. Municipalities are to take nothing from the general sovereignty except what is expressly granted; but when a power is conferred which in its exercise concerns only the municipality, and can wrong or injure no one, there is not the slightest reason for any strict or literal interpretation with a view to narrowing its construction. If the parties concerned have adopted a particular construction not manifestly erroneous, and which wrongs no one, and the State is in no manner concerned, the construction ought to stand. That is good sense, and it is the application of correct principles in municipal affairs."

Upon a review of the whole case, considering the magnitude and importance of the issues involved as affecting the rights of the city of Detroit and the future of its citizens, we are of opinion that the case presented is not such an one as would compel this court to say that in the denial of the injunction sought by the complainant the learned circuit judge abused a discretion with which he is clothed.

The writ should be denied.

HOOKE and MOORE, JJ., concurred with BROOKE, J.

BLAIR, C. J. I am unable to concur in the result reached by Mr. Justice BROOKE in this matter. The solution of the street railway question for the city of Detroit is unquestionably a legislative problem for the determination of the common council. It only concerns the mayor in his official capacity, as all questions of municipal government concern the chief executive, charged with the duty of informing himself as to them and recommending action thereon from time to time. The

investigations which the mayor makes are for the purpose of enabling him to properly discharge the duties of his office and are compensated by the salary provided for the office. It is not contemplated by the charter of Detroit, in my opinion, that the mayor shall make extensive investigations requiring the examination of witnesses and the expenditure of large sums of money for the purpose of equipping himself to recommend action to the common council, and the powers essential to make the investigation effective *are not given* him therein. Such investigations fall within the domain of legislative action, and the local legislature is given the necessary powers to make them effective. The charter not conferring this power upon the mayor, but, by implication, negating it. Cooley on Constitutional Limitations (4th ed.), pp. 248-250; 28 Cyc. pp. 463, 464; *Union Depot & Railroad Co. v. Smith*, 16 Colo. 361 (27 Pac. 329); 1 Dillon on Municipal Corporations (4th ed.), § 96.

I have no doubt that the common council may choose its own method of collecting information to guide its legislative discretion. *Flint, etc., Plank-Road Co. v. Woodhull*, 25 Mich. 99 (12 Am. Rep. 283). It may, if it chooses, conduct its investigation through a committee of outsiders or through the mayor, providing the investigation is made in its behalf, in accordance with its directions, and subject to its control, and the results reported to it for its action. *State Tax-Law Cases*, 54 Mich. 350 (20 N. W. 493).

The resolution under discussion was not for the purpose of aiding the local legislature to perform its duty, but to assist the chief executive to perform his duty. The resolution directs the city controller "to pay any bills presented and approved by his honor, the mayor, out of said appropriation." This provision is in contravention of mandatory provisions of the city charter and is therefore illegal and void. *McCor-mick v. Bay City*, 23 Mich. 457. The fact, as alleged, that the mayor intends to pursue the charter course for the allowance of his bills, cannot validate this invalid resolution. The resolution must speak for itself unaffected by undisclosed intentions.

The writ will be granted.

GRANT, MONTGOMERY, ØSTRANDER, and McALVAY, JJ., concurred with BLAIR, C. J.

HOOKE, J. I concur with the Chief Justice in the opinion that the council has power to investigate existing conditions and necessities, as regards the street railway of Detroit, and to obtain and pay for professional and expert assistance therein; and I am not prepared to say that it may not call to its aid the business judgment of its citizens, for whose use it may procure, or cause to be procured, such assistance, and may pay the necessary expenses of such persons. I also think it may provide for the payment of the expenses of such persons, whose selection may be made by the council itself, a committee thereof, or confided to the mayor, through whom it may make its investigation. I find nothing in the resolution indicating that the information sought

111 to be acquired was not for the benefit of the council, as well as the mayor, and I am not satisfied that the council has not power to provide for the legitimate expense of the office of mayor, especially in the performance of duties imposed on him by the council. It appears to be conceded by counsel that it could not confer upon the controller the authority to pay money upon the certificate of the mayor alone, and the learned circuit judge has found that there is no cause for apprehension that he will. I therefore concur in the denial of the writ.

SECTION VI — *Power to Contract.*

13 cases.

KETCHUM v. CITY OF BUFFALO.

101

1856. 14 New York (4 Kernan), 356.¹

Suit by tax-payers of the city of Buffalo, against the city and one Austin. The city purchased land of Austin for market grounds at the price of \$35,000, and gave Austin its bond for that amount, payable in twenty-five years with semi-annual interest. The comptroller of the city presented to the common council his estimate of expenses to be levied by tax in which was an item of \$3,675, interest on said bond to Austin. Plaintiffs seek to have the transaction between Austin and the city declared void, and ask that the city be perpetually enjoined from levying any tax for payment of said bond or the interest thereon.

In the Supreme Court judgment was rendered dismissing the complaint. Plaintiffs appealed.

H. W. Rogers, for appellants.

John L. Talcott, for respondents.

SELDEN, J. [After deciding that the city had power, under its charter, to purchase land for the purpose of a market.]

But admitting that the city had a right to make the purchase, it is denied that it could purchase upon credit, and execute the bond given for the purchase money. The power of corporations in general to make contracts and incur debts in the prosecution of their legitimate business, and to give their promissory notes for such indebtedness, would seem to be firmly established, not only by universal practice, but by repeated judicial decision. (*Mott v. Hicks*, 1 Cow., 513; *Moss v. Oakley*, 2 Hill, 265; *Kelly v. The Mayor of Brooklyn*, 4 Hill, 263; *Moss v. McCullough*, 5 Hill, 131; *Attorney-General v. Life and Fire Insurance Company*, 9 Paige, 470; *McCullough v. Moss*, 5 Denio, 567.)

In the last of these cases the judgment was reversed, not on the ground that the corporation had not the power to contract the debt,

¹ Statement abridged. Only so much of the case is given as relates to a single point.—Ed.

City can give
it in payment of
bonds.

City has power to
purchase land for
market grounds.

City has power to
contract & incur
debts in the
prosecution of
its business.

or to give the promissory note, but for the reason that the property purchased was not required for the legitimate purposes of the company. Senator Lott, by whom the leading opinion was given, says: "I am satisfied that the note in question was given for purposes and objects unauthorized by its charter, and, therefore, not obligatory." It is true, the learned senator, in the course of his opinion, seems to intimate a doubt whether a corporation like that of the Rossie Lead Mining Company, instituted for specific business purposes, with a limited capital, can virtually add to that capital by the purchase of a large amount of property upon credit, especially where, as in that case, each stockholder is made individually liable for all the debts of the company.

However this may be, sound reason, no less than the authorities to which I have referred, forbid that it should be held that a corporation may not incur a debt in the exercise of its appropriate powers, or may not purchase, upon a credit, property which is required for purposes authorized by its charter. Municipal corporations, especially, obtain their funds, for the most part, periodically, by means of annual taxation, and it is impossible by any degree of care to adjust their means to their wants so accurately but that exigencies will arise, rendering necessary a resort to the credit of the corporation.

To deny to such corporations the power to use their credit in any case, would scarcely comport with the objects for which they are created. Under such a rule they could not procure materials for the repair of a bridge, unless the money had been raised in advance. The affairs of no municipal corporation were ever conducted, I presume, without incurring obligations, for various purposes, in anticipation of its revenues. It may be said that there is a distinction between incurring debts for the ordinary and current expenses of the corporation, to be defrayed by the expected annual income, and debts upon an extended credit, for objects of a permanent character, as, for instance, that a debt may be created for the repair of a bridge or market, but not for the erection of or procuring a suitable site for such market. I am unable to discover any solid basis for such a distinction, or any definite line by which it could be marked.

It is easy to see that it would be extremely difficult, if not impossible, to manage the affairs of a municipal corporation, without the power to contract upon its credit. Every contract for labor, not paid for in advance, is necessarily a contract upon credit, because the labor, when once performed, cannot be recalled. It is otherwise in case of the purchase of property to be paid for on delivery, because, unless payment is made, it need not be delivered. Still, if it consist of several parcels, as of several loads of lumber or of stone, to be delivered at different times, and paid for when all are delivered; this is a contract upon credit for all except the last load. Were a corporation authorized in general terms to build a bridge, without specification of manner or means, it would scarcely be doubted that it might

contract with some person to furnish the materials and erect the bridge at a specific price, to be paid upon the completion of the job, and yet this would be to build the bridge entirely upon the credit of the corporation.

But it is useless to multiply arguments upon this point. The power of a corporation to contract upon its credit cannot reasonably be denied; and if it may do so at all, there is, I think, no rule of law which limits the length of such credit. If a corporation may make an executory contract for property or services, it must of necessity have power to agree upon the mode and terms of payment; and to say that it cannot also agree as to the time of payment, is to make a distinction which rests upon no sound principle, and is not warranted by any authority.

If, then, the city of Buffalo had power, under its charter, to purchase ground for a market, it had authority, so far as the charter is concerned, to do so upon a credit to which there was no limit but its own discretion, and the right to give the single bill in question would follow as a necessary consequence. Power to contract the debt must carry with it power to give a suitable acknowledgment of the indebtedness, in the form either of a promissory note or a single bill. I can conceive no well grounded rule which would concede one of these powers and deny the other, and no such distinction is warranted by the cases.

It may be objected that the reasoning here adopted tends to establish the right of a corporation to contract a debt for any authorized purpose, by borrowing the money necessary to accomplish it; a right which, from the numerous legislative acts on the subject, it would seem corporations have not generally been supposed to possess. It is true the power to contract to pay A. \$10,000 at the end of a year for doing certain work, and the power to borrow \$10,000 of B., upon a credit of a year, for the purpose of paying A. for doing the work, might seem, at first view, to be substantially identical. The amount is the same, and the time of payment the same; the creditor only is different.

A little examination, however, will show that there is a very material difference between the two. If the power of the corporation to use its credit is limited to contracting directly for the accomplishment of the object authorized by law, then the avails or consideration of the debt created cannot be diverted to any illegitimate purpose. The contract not only creates the fund, but secures its just appropriation. On the contrary, if the money may be borrowed, the corporation will be liable to repay it, although not a cent may ever be applied to the object for which it was avowedly obtained. It may be borrowed to build a market and appropriated to build a theatre, and yet the corporation would be responsible for the debt. The lender is in no way accountable for the use made of the money. It is plain, therefore, that if the policy of limiting the powers and

expenditures of corporations to the objects contemplated by their charters is to be carried out, their right to incur debts for those objects must be strictly confined to contracts which tend to their direct accomplishment. If they may procure the requisite funds by the indirect method of borrowing, they may resort to any other indirect mode of obtaining them, such as establishing some profitable branch of trade, entering into commercial enterprises, &c., the avowed object being to obtain the means necessary to accomplish some authorized purpose. No one can fail to see that to concede to corporations the power to borrow money for any purpose, would be entirely subversive of the principle which would limit their operations to legitimate objects. Hence the distinction between such a power, and that of stipulating for a credit in a contract made for the direct advancement of some authorized corporate object. It is true that the act to restrict and regulate the power of municipal corporations to borrow money, contract debts, and loan their credit, passed in 1853 (*Laws of 1853*, 1135), would seem to proceed upon the assumption that such corporations, independently of legislative restrictions, have the power to borrow money. This important question, however, is yet to be judicially settled, but as it is not involved in this case, I will not dwell longer upon it.

*Re - to be carried out
confined to their
to direct accomplishment
of object.*

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[The concurring opinion of WRIGHT, J., is omitted.]

Judgment affirmed.

MILLS v. GLEASON.

102

1860. 11 Wisconsin, 470.¹

ACTION to restrain Gleason, treasurer of the county of Dane, from selling the lands of the plaintiff lying in the city of Madison, for the taxes assessed in the year 1857. Said tax was levied, in part, to raise a sum of \$8,000.00, to be paid as interest on a loan of \$100,000.00 previously obtained by the city, and for which bonds had been issued. These bonds had been negotiated at a discount. The money thus received had been paid into the city treasury, and much of it had been used in the erection of city buildings and for general city purposes. The plaintiff claimed that the city had no power to effect the loan or to levy a tax to pay interest upon it.

*Bonds issued for
erection of city
buildings & gen. city
purposes.*

The County Court gave judgment for the plaintiff, and the defendant appealed.

S. U. Pinney, for appellant.

Abbott & Clark, for respondent.

PAYNE, J. . . . But it is claimed that the city had no power to make

¹ Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — Ed.

2. City borrow - an incident to - a power

this loan, or issue its bonds therefor. There is no special act and no provision in its charter expressly authorizing it, and it was said that without this, the power to borrow money did not exist, and could not be claimed as incidental to the execution of the general powers granted by the charter. The charter does confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things, for the execution of which, money would be necessary as a means. It would seem, therefore, that in the absence of any restriction, the power to borrow money would pass as an incident to the execution of these general powers, according to the well settled rule that corporations may resort to the usual and convenient means of executing the powers granted; for certainly no means is more usual for the execution of such objects, than that of borrowing money.

Practice of obtaining such acts

But an argument against the right is derived from the practice which has prevailed to a considerable extent, of obtaining special acts of the legislature, authorizing the procurement of loans by municipal corporations, and the issuing of bonds or other securities in payment.

We are not aware to what extent, if any, this practice has prevailed in this state, as to loans for purposes clearly municipal, and authorized by the charter; but it seems to have been resorted to sometimes, even in such cases, in other states. The argument drawn from the assumption on the part of the legislature of the necessity of such acts, is one always entitled to consideration, and sometimes of much weight, though never conclusive; and we think, owing to the peculiar nature of the subject matter, that in cases involving a loan by corporations, it is of less force than in almost any other, for capital is of a timid jealous disposition. It delights in certainty, and is alarmed by doubts. It has been held with great strictness, that corporations can exercise no powers except those granted by their charter. When, therefore, the charter does not expressly give the power of borrowing money, even though it grants powers to which this might be claimed as incident, yet there is room for doubt, a chance for an argument, and that being so, it might, as a matter of policy, facilitate the loan by removing all uncertainty by an express act of the legislature. And the fact that such acts have been passed, being then clearly necessary, when these corporations have been authorized to issue bonds in aid of purposes outside of their charters, may have had a tendency to induce a resort to the same practice when the bonds were issued for some purpose authorized by the charter, though in that case such legislation may not have been necessary. For these reasons we think there is nothing in this practice sufficient to overthrow the general rule, that in the absence of restrictions, a corporation authorized to contract debts and to execute undertakings requiring money, may borrow money for those purposes, and issue its bonds or other obligations therefor.

This question is alluded to in *Ketchum vs. the city of Buffalo*, 4th Kern., 356, and the court held that the fact that in several other

instances, the legislature had expressly granted power to corporations to "purchase market lots," did not justify the conclusion that the city of Buffalo could not exercise the power as incidental to the general power of establishing a market. The court held that, under that general power, it might purchase the lot on credit, and issue its bonds in payment. And, after carefully considering the suggestions made by the learned judge who delivered the opinion, we fail to perceive any substantial distinction, so far as the question of power is concerned, between the method there adopted and that adopted by the city of Madison in this case. True, it is there suggested that the question whether the city of Buffalo could have borrowed the money and paid for the lot, and issued its bond for the money, was a different question, though at first view "they might seem identical." But on examining the points of distinction stated, we think they do not affect the question of power, but simply go to show that the one method of exercising it may afford less facility for a misapplication of the funds than the other. Thus it was said that if the money was borrowed to build a market, it might be used to build a theatre, whereas if the contract were directly for the market, and the bond given in payment, it would ensure the application of the fund to its legitimate object. This might be a good reason why the legislature should restrict the corporation to the one method of accomplishing the object; but when the power is granted without restriction as to the means, it does not, in our opinion, justify a court in saying that while the corporation has the power of using one means, it has not that of using another, though equally direct and well adapted to the accomplishment of the object, provided the funds are honestly applied; merely because it may afford greater facility for a misapplication. They might undoubtedly be misapplied in either case. Thus, what should prevent the city of Buffalo, having purchased a lot for a market, and given its bonds for it, from erecting a theatre instead of a market on the lot, if it was to be assumed that it was willing to pervert its funds and its credit to unauthorized purposes? Or, having purchased materials for a market, it might out of them erect a theatre. Or, having given its bond for the purchase of a lot, and the erection of a market, and then having raised by taxation the money to pay the bond, it might use the money to build the theatre, leaving the bond unpaid. This opportunity of misapplying the funds must exist under any method of executing the powers of a corporation. If one affords greater facility for it than another, the remedy is in restrictions by the legislature, and the selections of honest and capable agents by the people. But it affords no ground for a court to say that as a mere question of power, the corporation may not adopt the one method as well as the other; and it being established that a corporation may purchase upon credit such things as are necessary for the execution of its powers, we think it follows necessarily that it may borrow the money to pay for them, as that is one mode of purchasing upon credit.

J. Ketchum

*Chances for misapplication
not a reason for
limiting exercise of
power to one method*

Rule

power to tax does not
include power to
borrow.

Nor is the power of taxation conferred by the charter to be deemed to exclude the power of borrowing money. The case just referred to is an authority against such a proposition. It holds that, notwithstanding the power of taxation, the corporation may resort to its credit, not only for its ordinary current expenses, but for objects of a permanent character. The case of *Clark vs. School District*, 3 R. I., 199, is also in point. It was there held that a school district might borrow money to pay debts contracted for the erection of a school-house, and give its note therefor, and that its power of taxation was not to be construed as forbidding it to borrow money for a legitimate purpose. *Beers vs. Phoenix Glass Co.*, 14 Barb., 358, and *Mead vs. Keeler*, 24 Barb., 29, are also direct authorities in favor of the power of a corporation to borrow money, as incidental to the execution of its other powers. It was said on the argument, that it did not appear that the moneys received were all applied to municipal purposes. It does not appear how they were all applied, but we apprehend it would not be incumbent on the lender to show that they were properly applied. If the city had power to borrow money for legitimate purposes, a misapplication of the funds after they were obtained would not invalidate the contract. In *Bigelow vs. the City of Perth Amboy*, Dutch., 297, the city had purchased a quantity of flag-stone, for paving streets, and it was claimed that the charter had not been complied with, in respect to the proceedings preliminary to the paving by the city. But the court held that to be a question between the city and the lot owners, and they add: "But as between the creditors of the city and the corporation, the only question is whether the city agents, the mayor and council, had the power of purchasing the material in question. How the material was used, or whether it was used at all, is to creditor a matter of total indifference." So in a recent case in England, *Eastern Counties R. R. Co. vs. Hawkes*, 38 E. L. & E., 8, it was held that where the charter allowed the company to purchase lands for extraordinary purposes, a person contracting to sell them land was not bound to see that it was strictly required for such purposes, and that if he acted in good faith, without knowing of any intention to misapply the funds of the company, he might enforce the contract.

lender need not show
how money was properly
applied.

The principle of that decision would seem to warrant the proposition, that where a corporation has power to borrow money, a lender, acting in good faith, and supposing it to be borrowed for legitimate purposes, might recover, even though the corporation intended to devote it to objects unauthorized. And it would certainly sustain the position, that where it was borrowed for lawful objects, no subsequent misapplication of the funds could affect the rights of the lender, about which there is, in fact, no room even for the shadow of a doubt.

Judgment reversed. Cause remanded with direction that the complaint be dismissed.

TOWN OF HACKETTSTOWN v. SWACKHAMER.

1874. 37 *New Jersey Law*, 191.

On rule to show cause.

Argued at June Term, 1874, before BEASLEY, Chief Justice, and Justices BEDLE, WOODHULL and SCUDDER.

For the defendants, *Pitney*.For the plaintiff, *Vanatta*.

The opinion of the court was delivered by

BEASLEY, CHIEF JUSTICE. The note, which is the subject of this suit, was given by the treasurer of the town of Hackettstown, in the name and behalf of the town, for money borrowed. This case, therefore, raises the question whether a municipal corporation, in the absence of an express power for that purpose, can contract for loans for the supply of its ordinary expenses.

At the present time it seems to be generally conceded, that a private corporation, constituted with a view to pecuniary profit, has, by implication, when not in this particular specially restricted, the power in question. The law was so held in this state, in the case of *Lucas v. Pitney*, 3 *Dutcher* 221, and the same rule has been repeatedly recognized in other decisions. And this result is the appropriate product of the principle that corporate powers, which are the necessary accompaniments of powers conferred, will be implied. In these instances the ability to borrow money is so essential that without it the business authorized could not be conducted with reasonable efficiency, and, as it cannot be supposed that it was the legislative intent to leave the company in so imperfect a condition, the inference is properly drawn that the power to raise money in this mode is inherent in the very constitution of such corporate bodies. Such a deduction is simply, in effect, a conclusion that the lawmaker designed to authorize the use of the means fitted to accomplish the purpose in view. It has been often said that the means which can be thus raised up by implication must be necessary to the successful prosecution of the enterprise, and that the circumstance that they are convenient will not legalize their introduction. But the necessity here spoken of does not denote absolute indispensableness, but that the power in question is so essential that its non-existence would render the privileges granted practically inoperative, or incomplete. It is, consequently, obvious that a presumption, resting on such a basis as this, must spring up in favor of almost the entire mass of commercial and manufacturing corporations, for without the franchise to effect loans, the chartered business could be but imperfectly transacted. And yet, even in such instances, the usual inference that such an implied power exists may be repelled by the language of the particular charter or the peculiar circumstances of the case. In a word, the rule of law

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Imp. L. v. a
to borrow.

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in question is nothing but the discovery, by the courts, of the legislative intent, such intent having been ascertained by a construction of charters, as applied to the subject matters.

*Power to borrow
not nec. so not
implied.*

Taking this as the ground of our reasoning, I am at a loss to perceive how it can be inferred that a power to borrow money is an appendage to the usual franchises given to municipal corporations. Such a right cannot, in any reasonable sense, be said to be necessary within the meaning of that term as already defined. Under ordinary circumstances it is not certainly indispensable as common experience demonstrates. In the great majority of instances the municipal affairs are, with ease and completeness, transacted without it. I do not wish to be understood as indicating that under certain special conditions an opposite deduction may not be legitimately drawn. It is plain that it is practicable to impose a duty on a municipality requiring the immediate use of large sums of money, and in such a situation the inference may become irresistible that it was intended that funds were to be provided by loans. My remarks are to be restricted to that class of cases where charters are granted containing nothing more than the usual franchises incident to municipal corporations, and under such conditions it seems clear to me that the power to borrow money is not to be deduced. I have already said that it does not appear to be a necessary incident to the powers granted, for such powers can be readily and efficiently executed in its absence. It would be to fly in the face of all experience to claim that the ordinary municipal operations cannot be efficiently carried on except with the assistance of borrowed capital. Without any help of this kind, it is well known that our towns and cities have long been, and are now being, improved and governed. For the attainment of these ends it has not generally been found necessary to resort to loans of money. The supplies derived annually from taxation have been found amply sufficient for these purposes. Consequently I am unable to perceive any necessity to borrow money, under these conditions, from which the gift of such power to borrow is to be implied. It undoubtedly is clear that if, as has been asserted, the ends of the municipal charter can be conveniently reached, without a resort to the device of raising moneys by loan, there is not the least legal basis for a claim of the power to obtain funds in that way. Granted the fact that the charter can be executed with reasonable ease and with completeness, the conclusion is inevitable that the power in question cannot be called into existence by intendment, and as I claim the fact to exist I must, of necessity, reject the right of implication in question.

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Nor is there anything in the language or in the frame of the present charter which would seem to favor the idea of the existence of an authority in the corporation to borrow money. It is in the ordinary fashion, giving the usual prerogatives of administration, improvement and police, and then follows the important clause, declaring

"that it shall be lawful for the common council, from year to year, to vote and raise by tax such sum or sums of money as they shall deem necessary and proper." Of course there can be no doubt with respect to the purposes to which the money thus authorized to be levied is to be applied. It is the means whereby the duties of local government are to be discharged. There is no limitation on the amount that may be raised. But there is a limitation on the method of raising it. It is not a general authority to raise money in any mode which the common council shall devise. The restriction is, it shall be raised "by tax." How can it be claimed, then, that it can be raised by loan? The power to borrow money is, in a certain sense, a larger power than that of raising money by taxation. There is, in the nature of the thing, an immediate check to excessive taxation; that is, the resistance of the parties taxed. There is none such in the power to borrow, for the immediate burthen of a loan is but slightly felt. Indeed, it is difficult to imagine any greater power than one person can confer upon another than an unlimited authority to borrow money. It is a common thing for an agent to have the right to contract debts in the name of his principal; but a very uncommon thing for such agent to be authorized to borrow money *ad libitum*. A more dangerous confidence could scarcely be given. If the municipal authorities under one of these charters, which in these days are so common, have this power to borrow, which is claimed for them, such power is practically unlimited. I see no limit to it, except the good sense, virtue and intelligence of the depositaries of it. It may be resorted to on all occasions in the management of the affairs of the city. The use of such a power might, at the will of the officials, be co-extensive with the corporate operations. All the usual enterprises and improvements could be undertaken on a basis of a credit, and annual taxation, instead of being made the basis and measure of annual expenditure, could readily be converted into a subordinate auxiliary to an extended system of loans. It is plain that such a power would be full of peril to the owners of city property, and the widest door would be thus thrown open to extravagance, recklessness and fraud. In my judgment, if such a system was judicially recognized, and such recognition was promulgated, almost every city in the state would be soon overwhelmed with indebtedness. Nor do I for a moment believe that a municipality could obtain from any legislature an unrestricted power to borrow money. It is probable that such a boon has never been solicited by any public corporation. Our statutory history evinces clearly that the power in question has been granted with a stinted hand and circumscribed by well defined limitations. My judgment is entirely averse to raising up this dangerous power by implication. If the rules of law compelled the court to make such implication, it seems to me such result would be largely injurious to the well-being of the state; and it is, therefore, a satisfaction to know such rules of law do not exist. The

Unlimited power
to borrow a
dangerous inducement
to extravagance.

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authority to tax affords a sufficient source of funds requisite for all municipal purposes, and the consequence is there can be no inference of the existence of the superfluous power to borrow money for the same end.

An examination of the books will show that this question has not as yet received much judicial consideration. The courts of Wisconsin and Ohio have had this matter before them, and have arrived at a result the opposite of that which has just been stated. I have carefully weighed the arguments of these learned tribunals, but they have failed to convince my understanding. The cases referred to are those of *Mills v. Gleason*, 11 Wis. 470; and *Bank v. Chillicothe*, 7 Ohio, part II, 31. As a counterpoise to these views stands the weighty opinion of Judge Dillon, in his treatise on *Municipal Corporations*, Vol. I, § 81. Much emphasis is added to this expression of opinion, from the fact that this author had before him, at the time he wrote, the opposing cases just cited. In this state of the authority, it cannot be claimed that the principle is so settled that the judgment of this court cannot be freely exercised with respect to this important subject. My conclusion is that already expressed, that a right to borrow money is not to be inferred from any of the ordinary powers conferred in the charters of municipal corporations, and that, under ordinary circumstances, such a power can proceed only from an express grant to that effect.

Nor do I think that it adds anything to the right, to enforce the note in this case, that the money which it represents, and which was borrowed, has been expended in behalf of the corporation for legitimate purposes. The argument on this head was that, as the money had gone for the benefit of the corporation, the law, upon general principles, would compel its re-payment. If this is so, then the rejection of an implied power to borrow is of little avail. The doctrine, although repudiated in the abstract, would be ratified in the concrete. If this contention is tenable, it is impossible to close the eye to the fact that the loan, although held illegal and void in its inception, would thus, by a subsequent act, be rendered valid and enforceable. To style it, as was done in the argument, money had and received, would not change the real nature of the transaction. To permit a recovery of it in this secondary form would be, virtually and in truth, to effectuate a loan, and all the evils attendant on the power to borrow money in an unrestricted form, would supervene. And it is to be noted, that it is altogether a fallacy to argue that the law will raise an implied promise to repay the money after it has been used. The impediment to such a theory is, that the corporation has not the competency to make the promise thus sought to be implied. An express promise, to the effect contended for, would be illegal, and, therefore, clearly, the law will not create one by implication. It is not the case of a principal using money borrowed by his agent without authority, but it is the case of a principal who is

From the fact that the money was expended for the benefit of the corporation, it is not to be inferred that a power to borrow money is implied.

(2) not validated because money actually spent for the benefit of the corporation.

incapacitated by law from borrowing, and who, therefore, cannot legalize the act, either directly or by circuitry. Perhaps a parallel instance would be presented in case of a loan to a married woman at common law, the money being used by her. Her promise to repay the loan would be void; and, from the fact of her having made use of the money, no implied promise in law could be deduced.

The lender of such money may, perhaps, have his redress against the officer of the corporation, who unjustifiably held himself out as possessed of the right to take the loan in the name and on the responsibility of the city, or by a recourse to equity, asking to be subrogated to the rights of those creditors who have received his money, instead of having their debts paid by the corporation. But even if the holder of this note should be remediless, the result is the same. No one can justly reproach the law for not providing him a remedy for his own folly or indiscretion. Such folly or indiscretion may have enabled the city officials to create a burthen, or may have stimulated them to acts of extravagance which would not have been otherwise created or done. It is but just that the individual who has occasioned the evil should bear the loss. But whether the owner of this paper be remediless or not, it is enough for the present purpose to say that there is no apparent ground on which this money, thus illegally loaned, can be recovered by an action at law.

The establishment of these general principles necessarily leads to a decision against the plaintiff in this case. But there are narrower grounds which would conduct to the same result.

On the admission that the common council, which is the ruling power of the corporation, had authority to contract the debt in question, it was not shown at the trial, with anything like legal certainty, that this loan was either authorized or ratified by such body. The treasurer obtained the money and gave the note. The proof of his authorization consisted in his statement that he had a "verbal authority to borrow money needed for the purposes of the town." This is entirely too loose. Such a power could not be transferred, except by a formal resolution, passed at a legal meeting of the council, or by an ordinance duly enacted. Nor was it shown that the fact of the money's having been expended for town purposes, was ever known to the council. The result is that, at the trial, there was proof neither of the authorization of the treasurer, or of ratification of his act. One of the essentials of the plaintiff's case was wanting to it. On this ground alone there must be a new trial.

The further question was discussed at the bar, whether a municipal corporation, lacking a special authority to that end, can execute a promissory note. I have examined the subject, but the views already expressed render it unnecessary to pronounce any final conclusion with respect to it, for the purposes of the present case. I may say, however, that my present view is, that a corporate body of this character, has the general and inherent right to execute a note as a voucher of

(3)
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 cause neither
 authorized nor
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indebtedness, but that such note will not have the effect when in the hands of a *bona fide* holder before maturity, of cutting off the equities existing between the maker and payee. In this respect I fully concur in the learned opinion of Mr. Justice Bradley, recently read in the Supreme Court of the United States, in the case of *The Mayor v. Ray*, 19 Wall. 468.

Let a *venire de novo* be awarded.

GREAT FALLS BANK v. TOWN OF FARMINGTON. 104

1860. 41 New Hampshire, 32.¹

ASSUMPSIT on a promissory note of the defendants, signed by a majority of the selectmen, by order and in behalf of the town, originally payable to H. Rollins & Co., or order, in six months from date; and indorsed to plaintiffs. The note was given for liquors purchased by the town liquor agent upon the credit of the town; said agent so purchasing under verbal authority from the selectmen. The liquors were sold to the agent by Rollins & Co. in Massachusetts. Rollins & Co. were not licensed to sell liquors in Massachusetts, and the sale was in violation of the Massachusetts statute. The plaintiffs purchased the note for value, before maturity, and without any notice or knowledge of the consideration for which it had been given.

The foregoing facts appearing in evidence, a verdict was taken for plaintiffs; and the questions of law were reserved.

Wells & Eastman, for plaintiffs.

G. N. Eastman, Christie & Kingman, for defendants.

FOWLER, J. By the express provisions of the act of July 14, 1855 (Laws of 1855, ch. 1658), it was made the duty of every city, town and place in this State to establish one or more agencies "for the purchase of spirituous and intoxicating liquors, and for the sale thereof within such city, town or place, to be used in the arts, or for medicinal, mechanical and chemical purposes; and wine for the commemoration of the Lord's Supper; and for no other use or purpose whatever." The selectmen were liable to indictment for refusing to appoint an agent, even where the town had refused to provide the means to purchase the stock in trade of the agency. *State v. Woodbury*, 35 N. H. 230.

The selectmen of Farmington, or the liquor agent by them appointed, might, therefore, properly purchase, upon the credit of the town, the liquors necessary to supply the agency which the selectmen were required to establish. The town was legally liable to furnish the agency with such liquors, their credit might be pledged to procure them, and the selectmen, as the general prudential and financial agents

¹ Statement abridged. Portions of opinion omitted — Ed.

of the town, might, therefore, rightfully bind the town by a note given for the price of the liquors necessary for that purpose. It was within the scope of their authority as selectmen to bind the town by a contract to pay for liquors furnished the agency of the town by them established without any express authority from the town for that purpose. *Andover v. Grafton*, 7 N. H. 298; *Savage v. Rix*, 9 N. H. 265; *Glidden v. Unity*, 33 N. H. 571; *Hanover v. Weare*, 2 N. H. 131; *Hanover v. Eaton*, 3 N. H. 38; Ang. & Am. on Corp. 212, and authorities cited; Comp. Laws, ch. 36, sec. 2.

city had auth.
to pay for
liquors.

The selectmen of Farmington having had authority to give the note in suit, and the plaintiffs being innocent indorsees and purchasers thereof for value before its maturity, in the ordinary course of business, without notice or knowledge of any illegality in its consideration, upon general principles, this action may well be maintained, notwithstanding the consideration of the note was the sale of liquors in violation of the statute of Massachusetts; for generally the illegality of the consideration of a negotiable promissory note is no defence to it in the hands of an innocent indorsee and purchaser for value. *Doe v. Burnham*, 31 N. H. 426, and authorities; *Crosby v. Grant*, 36 N. H. 273.

But the defendants contend that, although the general rule be as we have stated it, they stand upon a different footing, inasmuch as if they may be holden to pay this note to the plaintiffs, they are in a worse condition in relation to the debt than they would have been if a negotiable note had not been given for it, and therefore the selectmen had no authority to give the note. The position seems to rest upon a remark of *Parker, J.*, in *Andover v. Grafton*, 7 N. H. 298, based upon the authority of *Stark v. The Highgate Archway Company*, 5 Taunt. 792; 1 E. C. L. 268.

[After stating the last named case.]

It is quite apparent that the whole extent of the authority of this case goes only to the point that corporations, like natural persons, are bound by the acts and contracts of their agents, only when those acts are done and those contracts are made within the scope of their authority; and that whenever a corporation is sued upon such a contract, whether it be a negotiable promissory note, or any other instrument, they are at liberty to show that the agents making it had no authority to execute it, in whosoever hands it may be; because, if the agents had only a restricted authority, a contract made by them beyond its limits could impose no obligation on the corporation; and whoever takes a contract executed by an agent, takes it subject to the risk of the authority of that agent to execute it. This doctrine is too familiar to need the citation of authorities. The subject is fully discussed, and most of the American authorities are collected, in Ang. & Am. on Corp., 2d ed., 213, 216, 229, 233, 239-246.

It seems to us the decision in *Andover v. Grafton* can and does go

no farther than the principle to which we have adverted. It is true, the learned Judge *Parker* not only says: "An indorsee who should take such a note [one given by the selectmen of a town in behalf of the corporation], even before due, would receive it subject to a liability to make the same proof respecting the authority of the selectmen to execute it in that particular case, as would be required of the promisee;" but adds, "and of course must be chargeable with notice of all the facts, and the note in his hands be liable to the same defence as in the hands of the original promisee;" and then cites *Stark v. The Highgate Archway Company*, as authority to sustain his position.

It is undoubtedly true, as a general principle, that whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of every thing to which such inquiry would naturally have led. Where a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. *Kennedy v. Green*, 3 Myl. & K. 719, 721, 722; *The Ploughboy*, 1 Gall. 41; *Hinde v. Vattier*, 1 M'Lean 118; *Bowman v. Walker*, 2 M'Lean 376; Sugd. Vend. & Purch. 1052, and cases cited; *Carr v. Hilton*, 1 Curt. C. C. 390; *Hastings v. Spencer*, 1 Curt. C. C. 504.

In the case before us this rule does not apply to the matter of defence relied upon. The note was signed by the selectmen for the defendant town, and therefore it was incumbent upon the plaintiffs to inquire whether it was signed by them within the scope of their authority, and given for a debt for which the credit of the town could properly be pledged by them, and this was all. They were not bound to inquire and ascertain whether or not the liquors purchased to enable the town to perform the duties imposed upon it by statute, were purchased in violation of a law of Massachusetts, or not, because that question was not one material to the authority of the selectmen to give the note. If they examined the statute under which the town acted, they found no special provision made for the supply of the town agents with liquors, and being satisfied that the note was given by the selectmen within the scope of their authority, for liquors actually received by the town to its own use, they were not required to go further, and inquire into the provisions of the statutes of another State, and into the question whether or not the sale of the liquors for the price of which the note was given was thereby prohibited; and if so, still further, whether or not our courts would enforce the prohibition here. They had no notice of any such facts, nothing to call their attention to them and put them upon their guard in relation to them.

To hold that if the defendants would be worse off in defending against the note, than they would have been in defending against the account for which it was given, the selectmen had no authority to give it, would make the authority of the agents depend upon the result of subsequent proceedings against their principal, and not

upon the question whether or not they were acting at the time of the transaction within the range of their legal authority. This would be quite absurd. If the selectmen had authority to give a negotiable note for the debt incurred in the purchase of liquor for the town agency, they had that authority none the less, because, upon well established principles, that note in the hands of a bona fide indorsee for a valuable consideration, without notice and before maturity, might not be open to some defences to which it might have been subject in the hands of the original payee, or which might have been made to a suit to enforce the debt for which the note was given. The town is a corporation, and like all other corporations must be subject to the same rules of law as are applicable to individuals. It is well settled that an individual who gives his note for liquors sold in violation of law, cannot be permitted to show the illegal consideration as a defence to a suit upon the note by an actual purchaser thereof before maturity and without notice. Whether he gave the note personally, or by an authorized agent, could make no difference. So it must be with a town or other corporation. The fact that the note is executed by an agent is apparent upon its face; of course the purchaser has notice, and buys the note at the risk of the authority of the agent to give it, but this is all. He has no notice, express or implied, of any illegality in the consideration, or in the sale whereby the debt was created for which the note was given, and is not therefore to hold it subject to any defence of that character.

With these views, there must be

Judgment upon the verdict.

CITY OF BRENHAM v. GERMAN AMERICAN BANK.

1892. 144 U. S. 173.¹

ERROR to U. S. Circuit Court for Western District of Texas.

Action by bank against the city of Brenham to recover upon coupons cut from negotiable bonds issued by it. The act incorporating the city contains the following provisions:—

Art. 3, Sect. 2: "That the city council shall have the power and authority to borrow for general purposes not exceeding (\$15,000) fifteen thousand dollars on the credit of said city."

Art. 7, Sect. 1: "Bonds of the corporation of the city of Brenham shall not be subject to tax under this act."

The Texas Constitution of 1876 provides that no city "shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; . . ."

¹ Statement abridged. Portions of opinions omitted. — Ed.

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Held No. 9. Find power to
issue negot. bonds

Express power to
borrow

The bonds in question, to the amount of \$15,000, were issued in 1879, "for general purposes," under a city ordinance.

The plaintiffs claimed to have the rights of *bona fide* purchasers, for value, before maturity.

Upon the trial the court charged the jury, that the power in the city to borrow money carried with it the authority to issue the bonds, and that the defendant had capacity to issue the bonds in question as commercial paper, and bind itself to pay them and the coupons. To this ruling, the defendant excepted. Verdict for plaintiff, and judgment thereon.

S. R. Fisher, for plaintiff in error.

A. H. Garland and *Henry Sayles*, for defendant in error.

BLATCHFORD, J. . . . The principal contention on the part of the defendant is that it was without authority to issue the bonds, and that they were void for all purposes and in the hands of all persons.

There is nothing in the charter of the defendant which gives it any power to issue negotiable, interest-bearing bonds of the character of those involved in the present case. The only authority in the charter that is relied upon is the power given to borrow, for general purposes, not exceeding \$15,000, on the credit of the city. . . .

That in exercising its power to borrow not exceeding \$15,000 on its credit, for general purposes, the city could give to the lender, as a voucher for the repayment of the money, evidence of indebtedness in the shape of non-negotiable paper, is quite clear; but that does not cover the right to issue negotiable paper or bonds, unimpeachable in the hands of a *bona fide* holder. In the present case, it appears that Mensing bought from the defendant \$5000 of the bonds at 95 cents on the dollar, and that other \$7000 of the bonds were sold by the city for the same price, it thus receiving only \$11,400 for \$12,000 of the bonds, and suffering a discount on them of \$600. The city thus agreed to pay \$12,000, and interest thereon, for \$11,400 borrowed. This shows the evil working of the issue of bonds for more than the amount of money borrowed.

It appears by the record that depot grounds in, and the right of way through, the city of Brenham were bought for the Gulf, Colorado and Santa Fé Railroad Company with money realized from the sale of bonds issued under the ordinance of June 7, 1879, and that \$3000 of such bonds were used by the city for fire department purposes.

The power to borrow the \$11,400 would not have been nugatory, unaccompanied by the power to issue negotiable bonds therefor. *Merrill v. Monticello*, 138 U. S. 673, 687; *Williams v. Davidson*, 43 Texas, 1, 33, 34; *City of Cleburne v. Railroad Company*, 66 Texas, 461; 1 Dillon on Municipal Corp. 4th ed. § 89, and notes; § 91, n. 2; § 126, n. 1; §§ 507, 507 a.

The confining of the power in the present case to a borrowing of money for general purposes on the credit of the city, limits it to the

power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per annum, semi-annually, for at least ten years. It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case.

A review of the cases on this subject in this court will be useful.

[The learned Judge then cited, and commented upon, *Rogers v. Burlington*, 3 Wallace, 654; *Mitchell v. Burlington*, 4 Wallace, 270; *Police Jury v. Britton*, 15 Wallace, 566; *Claiborne County v. Brooks*, 111 U. S. 400; *Concord v. Robinson*, 121 U. S. 165; *Kelley v. Milan*, 127 U. S. 139; *Norton v. Dyersburg*, 127 U. S. 160; *Young v. Clarendon Township*, 132 U. S. 340; and *Hill v. Memphis*, 134 U. S. 198. He quoted, *inter alia*, the statement of Mr. Justice Bradley in *Police Jury v. Britton* — that it was one thing for county and parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations, which might be multiplied to an indefinite extent.]

In *Merrill v. Monticello*, 138 U. S. 673, 687, 691, it was held that the implied power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if existing at all, did not authorize it to create and issue negotiable securities to be sold in the market and to be taken by the purchaser freed from the equities that might be set up by the maker; and that to borrow money, and to give a bond or obligation therefor which might circulate in the market as a negotiable security, freed from any equities that might be set up by the maker of it, were essentially different transactions in their nature and legal effect. In the opinion of the court, which was delivered by Mr. Justice Lamar, the cases of *Police Jury v. Britton*, *Claiborne County v. Brooks*, *Kelley v. Milan*, *Young v. Clarendon Township* and *Hill v. Memphis* were cited with approval. It was added: "It is admitted that the power to borrow money, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness, by the corporation, to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and, perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond.

as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuing and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a sale, is not so in fact; and that the so-called purchaser who takes the bond and advances his money for it is actually a lender, as much so as a person who takes a bond payable to him in his own name."

The opinion then stated that the logical result of the doctrines announced in the five cases which it cited clearly showed that the bonds sued on in the case of *Merrill v. Monticello* were invalid, and added: "It does not follow that, because the town of Monticello had the right to contract a loan, it had, therefore, the right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case, all that can be contended for is, that the town had the power to contract a loan, under certain specified restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality. It is true that there is a considerable number of cases, many of which are cited in the brief of counsel for plaintiff in error, which hold a contrary doctrine. But the view taken by this court in the cases above cited and others seems to us more in keeping with the well recognized and settled principles of the law of municipal corporations."

We, therefore, must regard the cases of *Rogers v. Burlington* and *Mitchell v. Burlington* as overruled in the particular referred to, by later cases in this court. See 1 Dillon's Mun. Cor. 4th ed. §§ 507. 507 a.

We cannot regard the provision in the charter of the city, that bonds of the corporation of the city "shall not be subject to tax under this act," as recognizing the validity of the bonds in question. Whatever that provision may mean, it cannot include bonds unlawfully issued.

As there was no authority to issue the bonds, even a bona fide holder of them cannot have a right to recover upon them or their coupons. *Marsh v. Fulton County*, 10 Wall. 676; *East Oakland v. Skinner*, 94 U. S. 255; *Buchanan v. Litchfield*, 102 U. S. 278; *Huyes v. Holly Springs*, 114 U. S. 120; *Davies County v. Dickinson*, 117 U. S. 657; *Hopper v. Covington*, 118 U. S. 148, 151; *Merrill v. Monticello*, 138 U. S. 673, 681, 682.

As the action here is directly upon the coupons, and there is no right of recovery upon them, the judgment must be

*Reversed, and case remanded to the Circuit Court, with a direction . . . to enter . . . a general judgment for the defendant.*¹

HARLAN, J. (with whom concurred BREWER, J., and BROWN, J.), dissenting.

[After reviewing various cases cited in the majority opinion.]

It thus appears that in no one of the above cases, decided since *Rogers v. Burlington*, was there any question as to negotiable securities being issued under an express power to borrow money; and that some of them concede that such a power carries with it authority to give a negotiable paper for money borrowed.

The case which seems to be much relied upon to support the present judgment is *Merrill v. Monticello*. But we submit that it does not sustain the broad doctrine that negotiable securities may not be issued in execution of an *express power to borrow money*. What could or could not be done, under such a power, was not a question involved in that case. The question was whether authority in the town of Monticello to issue negotiable bonds could be *implied*, not from an express, but from an *implied power to borrow money*.

[After commenting upon *Merrill v. Monticello*, 138 U. S. 673, and *City of Savannah v. Kelly*, 108 U. S. 184.]

It is, perhaps, proper to say that our views find support in the admirable commentaries of Judge Dillon on the Law of Municipal Corporations. The court refers to sections 507 and 507 a of those Commentaries. But those sections do not, in any degree, support the conclusion reached in this case. The doctrine which the learned author declares, in those sections, to be alike unsound and dangerous, is, "that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* thereto the power to issue commercial securities, that is, paper which cuts off defences when it is in the hands of a holder for value acquired before it is due." But Judge Dillon, while agreeing that the power to issue commercial paper, unimpeachable in the hands of a *bona fide* holder, is not among the ordinary *incidental* powers of a public municipal corporation, and must be conferred expressly, or by fair implication, says, after a careful review of the authorities: "*Express power to borrow money*, perhaps, in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as, for example, subscriptions to aid railways and other public improvements, will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability."

¹ In 144 U. S. 549, a petition for rehearing was denied; but the above order was modified. The judgment below was reversed, and the cause was remanded for further proceedings not inconsistent with the above opinion of BLATCHFORD, J. — Ed.

A Dillon's Mun. Corp. § 125, 4th ed. It is eminently just to apply that rule in the present case, because the act giving the city of Brenham authority to borrow, not exceeding \$15,000, for general purposes, expressly provided that its *bonds* should not be subject to tax under that act. Such a provision could have had reference only to negotiable bonds, which would be put upon the market for the purpose of raising money.

It seems to us that the court, in the present case, announces for the first time that an express power in a municipal corporation, to borrow money, for corporate or general purposes, does not, under any circumstances, carry with it, by implication, authority to execute a negotiable promissory note or bond for the money so borrowed, and that any such note or bond is void in the hands of a bona fide holder for value. There are, perhaps, few municipal corporations anywhere that have not, under some circumstances, and within prescribed limits as to amount, express authority to borrow money for legitimate, corporate purposes. While this authority may be abused, it is often vital to the public interests that it be exercised. But if it may not be exercised by giving negotiable notes or bonds as evidence of the indebtedness so created — which is the mode usually adopted in such cases — the power to borrow, however urgent the necessity, will be of little practical value. Those who have money to lend will not lend it upon mere vouchers or certificates of indebtedness. The aggregate amount of negotiable notes and bonds, executed by municipal corporations, for legitimate purposes, under express power to borrow money simply, and now outstanding in every part of the country, must be enormous. A declaration by this court that such notes and bonds are void, because of the absence of *express* legislative authority to execute *negotiable* instruments for the money borrowed, will, we fear, produce incalculable mischief. Believing the doctrine announced by the court to be unsound, upon principle and authority, we do not feel at liberty to withhold an expression of our dissent from the opinion.

MOLLOY v. NEW ROCHELLE.

106

1910. 198 N. Y. 402.

APPEAL from a judgment entered January 30, 1908, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which overruled plaintiff's exceptions ordered to be heard in the first instance by the Appellate Division and directed a dismissal of the complaint.

The defendant's charter provides: "Whenever any expenditures to be made or incurred by the common council or city board or any city officer in behalf of the city for work to be done, or materials or supplies to be furnished, . . . shall exceed two hundred dollars, the city clerk shall advertise for and receive proposals therefor, in such manner as the common council, or as the board or officer charged with making such contract shall prescribe, and the contract therefor shall be let to the lowest responsible bidder, who shall execute a bond to said city with one or more sureties, being freeholders, for the faithful performance of the contract." Laws of 1899, chapter 128, section 33.

The city clerk in pursuance of said statute and resolutions of the common council of the defendant published a notice as follows: "Sealed proposals will be received by the city clerk at his office . . . for the regulating and grading of . . . in the city of New Rochelle upon plans and specifications prepared by the city engineer which may be procured upon application at his office in the city hall building. . . . A certified check to the amount of \$1,000 must accompany each bid. . . . The common council reserves the right to reject any and all bids. . . ."

In pursuance of such notice six bids were filed in accordance with said advertisement. The bids were in items which required a computation to determine the aggregate amount of each bid. Accompanying the plaintiff's bid was certified check for \$1,000 and a written statement by a responsible surety company that in case the contract was awarded to the plaintiff such surety company would become bound as such surety and guarantor for the faithful performance of the contract and execute a bond therefor as required by the statute. The plaintiff was a responsible bidder. After the opening of the bids the common council referred all the bids to the street and sidewalk committee and the city engineer to tabulate and report at an adjourned meeting and the meeting then adjourned to a day specified.

On the adjourned day the committee to which the bids were referred reported, by which report it appeared that the aggregate amount of the

plaintiff's bid was \$61,626.30, and that he was the lowest bidder. Without discussion or further consideration a resolution was then offered and passed as follows: "Resolved, that the bid of F. W. Molloy (plaintiff) be rejected." Thereupon a further resolution was adopted as follows: "On motion . . . the contract for the improvement of North Avenue, Horton Avenue and Brook street is awarded to Ensignor Brothers at the sum of \$64,204.40." The plaintiff thereupon filed a protest against the action of the common council and subsequently brought this action.

At the Trial Term the plaintiff in addition to showing the facts as stated offered evidence to show that his profits on the contract would have been \$16,889.40 and rested. The court thereupon dismissed the complaint and ordered that the exceptions taken during the trial be heard in the first instance at the Appellate Division, and that entry of judgment upon the verdict aforesaid be suspended in the meantime until the hearing and decision by said Appellate Division of said exceptions. The Appellate Division overruled the exceptions and judgment was entered dismissing the complaint.¹

CHASE, J. Provisions similar to the one in the defendant's charter from which we have quoted are common in municipal charters everywhere. Such provisions are intended to prevent favoritism. They result from an effort to prevent official action being influenced by improper motives. The same effort to prevent improper official action finds expression in the Village Law (section 332), the General City Law (section 3) and in many municipal charters, where it is provided that an officer therein shall not be directly or indirectly interested in a contract which he, or a board of which he is a member, is authorized to make on behalf of the municipality.

Municipal officers acting in behalf of the municipality should not have a personal interest in determining who shall be awarded a contract or be affected in any way in their official action towards a favorite among the bidders. Such contracts should be made with the lowest responsible bidder therefor, because there is less opportunity in contracts so let for improper special agreements to the disadvantage of the corporation, and such contracts are in consequence thereof, and because of the competition, more economical for the municipality. The meaning and purpose of provisions in municipal charters requiring that contracts shall be made with the lowest responsible bidders therefor have been repeatedly defined and stated by the courts.

In *Brady v. Mayor, etc., of N. Y.*, 20 N. Y. 312, the court, referring to a similar provision in the charter of the city of New York, say: "It was based upon motives of public economy, and originated, perhaps,

¹ Arguments and part of opinion omitted.—Ed.

in some degree of distrust of the officers to whom the duty of making contracts for the public service was committed. If executed according to its intention, it will preclude favoritism and jobbing, and such was its obvious purpose. It does not require any argument to show that a contract made in violation of its requirements is null and void." (p. 316.)

In *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, the court, referring to a similar provision in the charter of Long Island City, say: "This provision was inserted in the charter undoubtedly to prevent favoritism, corruption, extravagance and improvidence in the procurement of work and supplies for the city, and should be so administered and construed as fairly and reasonably to accomplish this purpose." (p. 634.)

Such a statutory provision enacted as a protection to the corporation cannot be used to make a disobedience of its provisions by the municipal officers a double source of punishment to the municipality. If the plaintiff is right in his contention then a disobedience of the provisions of the statute will make the municipality pay the difference between the lowest bid and the bid for which the contract is made and also the profit that the lowest responsible bidder would have made if the statute had not been violated. But such is not the purpose of the charter provision.

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Although the plaintiff asserts rights under the statute, he also claims to be entitled to recover on contract. No contractual relation can arise merely from a bid unless by the terms of the statute and the advertisement a bid in pursuance thereof is, as a matter of law, an acceptance of an offer wholly apart from any action on the part of the municipality or any of its officers. Such plainly is not the plaintiff's case. The statute and the advertisement in this case call for proposals. The common council reserved the right to reject any and all bids. Under a statute requiring that all contracts shall be awarded to the lowest bidder, the body awarding the contract acting in good faith may refuse to award the contract if they deem it for the best interest of the city to do so, and may reject all of the bids and readvertise. *Walsh v. Mayor, etc., of New York*, 113 N. Y. 142.

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This court in *Erving v. Mayor, etc., of New York*, 131 N. Y. 133, say: "The awarding of the contract on the part of the officer to one of several bidders requires the exercise on his part of judgment and discretion and the award itself should be manifested by some formal official act on his part, and ordinarily reduced to writing and made a part of the records in his department. In no other way can the rights of the parties be preserved, at least prior to the actual execution of the contract. The mere arithmetical operation of ascertaining which bid is the lowest does not constitute an award. The duty of the commis-

sioner to examine the proposals and award the contract is judicial in its nature and character, and the award is the result of a judicial act." (p. 138.)

The plaintiff's bid in this case was never accepted. It was expressly rejected by the common council. The plaintiff, therefore, does not sustain a contractual relation with the defendant and cannot sustain this action as upon contract. The authorities mentioned by the plaintiff are all distinguishable from this case. They are each based upon an accepted bid.

Council for the appellant in his oral argument requested that we should discuss in this opinion the question of the power of the courts in any case to direct by *mandamus* the officer or board charged with the duty of entering into municipal contracts as to which of several bidders therefor should be awarded the contract. That question is not presented on this appeal for our determination. It should be left for discussion and determination in a case where the question is directly and necessarily involved, unaffected by this decision except so far as it is controlled by what we have actually and necessarily decided herein.

The plaintiff cannot sustain this action and the judgment should be affirmed, with costs.

VANN, J. I concur in the result upon two grounds:

1. The plaintiff had no right to recover damages from the defendant for breach of contract, because there was no contract, as is clearly shown by Judge CHASE in his opinion.

2. The remedy of the plaintiff was by *mandamus* to compel the execution of a contract in accordance with the statute. He was the lowest responsible bidder: he tendered adequate security and the statute commanded the common council, unless they rejected all bids, to award the contract to him. *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631.

The rejection of his bid and the acceptance of one higher by several thousand dollars was arbitrary and illegal. It was presumptively corrupt, for favoritism is one form of corruption. For such a violation of law by those who represent the city there should be a remedy against the city and, as it cannot be by way of damages for breach of contract it should be by *mandamus*. Otherwise competition may be stifled through the want of inducement to bid for public work.

The opinion in *People ex rel. Lunney v. Campbell*, 72 N. Y. 496, in so far as it declares that there is no remedy by *mandamus* in such cases, was *obiter* and should be disregarded. At least, if the court is of the opinion that *mandamus* will not lie, a suggestion should be made to the legislature, for the public as well as the lowest bidder need protection. In many cases the public can be adequately protected only through the lowest bidder. According to the law, as apparently left by the decision about to be made, the city is helpless because it is in the hands of the wrongdoers, and if the lowest bidder has no remedy,

there is no one impelled by duty or self-interest to prevent the violation of an important provision, common to nearly all municipal charters, designed to protect the public, but now practically useless.

CULLEN, Ch. J., HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK JJ., concur with CHASE, J.; VANN, J., concurs in result in opinion.

Judgment affirmed.

CITY OF VALPARAISO v. GARDNER. 107

1884. 97 Indiana, 1.¹

FROM the Porter Circuit Court.

E. D. Crumpacker, H. A. Gillett, and A. D. Bartholomew, for appellants.

W. Johnston, for appellee.

ELLIOTT, C. J. The complaint of the appellee avers that he is a resident taxpayer of the city of Valparaiso; that the municipal officers are about to let a contract to a water-works company for supplying the city with water for a period of twenty years, at an annual expense to the municipality of \$6,000; that the corporate indebtedness exceeds five per centum of the assessed value of the taxable property of the city and that there is no money in the treasury. The prayer of the complaint is for an injunction restraining the corporate authorities from entering into the contract.

The appellants answered, admitting that the appellee was a taxpayer; that the city was indebted in excess of two per centum of the aggregate value of the taxable property, and averring that the city has a population of over five thousand persons and is rapidly increasing in population; that it has no facilities for extinguishing fires except three cisterns, which are wholly inadequate, and that the safety of the city demands that the contract mentioned in the complaint be entered into and a supply of water secured; that the assessed value of taxable property, as shown by the assessment roll, amounted to \$1,350,000; that from other sources than taxation the revenue of the city is \$2,500 per annum; that the ordinary current expenditures are less than \$6,000 per annum, and that the annual revenues of the city are sufficient to pay all the ordinary expenditures of the city and the water rent of \$6,000 per annum, besides providing for the accumulation of a sinking fund, as the law requires; that the intention was that the terms of the proposed contract should be so adjusted that when the water-works were completed and an instalment of rent earned, there would be money sufficient in the treasury to pay it, derived from current revenues, and to so fix the time of the payment

*Let supply city
water for 20 yrs
\$6000 per annum*

*Held - not a debt
within*

¹ Portions of opinion omitted. — Ed.

of future instalments that they should be within the current revenues of the city, and yet leave money sufficient to meet all other corporate expenses.

Const.

In 1881 an amendment to the Constitution was adopted, in which this provision is incorporated: "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate, exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void." This provision received consideration in *Sackett v. City of New Albany*, 88 Ind. 473, but the question there presented and decided was very different from that which here faces us. The point decided in that case was that a city could not issue bonds for current expenses where there were no funds in the treasury and the existing indebtedness exceeded two per centum of the value of the taxable property of the municipality. There the question was not whether the claim which the municipal officers were about to pay in bonds was or was not a debt within the meaning of the Constitution; while here that is the question, so that we come to the decision of this case unfettered by any former adjudication of this court.

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of the Constitution?"

The question is a grave one, and not entirely without difficulty. If we hold that the contract to pay an annual water rent of \$6,000 during a period of twenty years creates a debt for the aggregate sum of \$120,000, and is a debt within the prohibition embodied in the Constitution, we should lay down a principle that would, in a great majority of instances, put an end to municipal government. If it be true that an agreement to pay a given sum each year for a long period of years constitutes a debt for the aggregate sum resulting from adding together all the yearly instalments, then it is extremely doubtful whether there is a city in the State that has authority to repair a street, dig a cistern or build a sidewalk, for nearly every city has contracts for gas and water supplies running for a long series of years, in which the aggregate amount of annual rents would of themselves equal, if not exceed, the limit of two per centum on the value of taxable property. We know, as matter of general knowledge, that water-works and gas-works require the outlay of enormous sums of money, and that such enterprises are not undertaken under contracts running for short periods of time. If the aggregate sum of all the yearly rents is to be taken as a debt within the meaning of the Constitution, then many cities will be left without the means of procuring things so essential to public welfare and safety. We are not to presume, unless coerced by the rigor of the words used, that the framers of the amendment, or the electors who voted for it, intended to destroy the corporate existence of our municipalities or

to leave them without water or light. Nor are we to presume that the electors were ignorant of the existence, condition and necessities of our great towns and cities. On the contrary, we are to presume that these things were known to the electors, and that they intended to foster the best interests of these instrumentalities of local government. An error frequently finds its way into trains of reasoning from the assumption, often made, that the officers are the corporants, and not the officers, who constitute the public corporations of the land. *Grant Corp.* 357; *Lowber v. Mayor, etc.*, 5 Abbott Pr. 325. *Clarke v. City of Rochester*, 24 Barb. 446. To deny the right to procure water and light is to deny it to the inhabitants of the towns and cities, and these form no inconsiderable part of the population of the State. We cannot, therefore, by mere intendment declare that the electors of the State meant to lay down a rule that should practically take from the inhabitants of our cities the power to supply themselves with water or light. To reach the conclusion that they meant to do this, we must find clear warrant in the language of the constitutional provision itself. We agree that if it be found that the language used is clear and explicit, we must give it effect, no matter how disastrous the consequences may be. While it is our duty to yield to the words of the Constitution, still, in determining what meaning they were intended to have, it is proper to consider the circumstances under which the provision was adopted and the object it was intended to accomplish. *Cooley Const. Lim.* (5th ed.) 78, 79.

In view of the warring among the adjudged cases it is not easy to affirm that the word "debt" has a firmly settled meaning. In one case it was said, "But the compensation to this contractor was not a debt within the sense of this provision, until the service was performed and the contractor was entitled to be paid. It was, no doubt, an obligation, in some sense, from the time the contract was entered into, but it was not a debt in the popular sense" of the term. *Weston v. City of Syracuse*, 17 N. Y. 110. A similar definition is annexed to the word in the opinion of the court, written by the eminent jurist, Judge DENIO, in *Garrison v. Howe*, 17 N. Y. 458. It was said in *Wentworth v. Whittemore*, 1 Mass. 471, "but whenever it is uncertain whether anything will ever be demandable by virtue of the contract it cannot be called a debt." By the Supreme Court of California it was said: "A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened." *People v. Arguello*, 37 Cal. 524. In *Sackett v. City of New Albany*, *supra*, this language was used: "By 'indebtedness,' in this connection, we mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement." Conceding that there are cases giving the word "debt" a somewhat

different meaning from that affixed to it by these authorities, still they are sufficient to prove, at least, that the word cannot be said to have a firmly settled meaning. It is not necessary for us to decide that the meaning given the word in the cases cited is that which the word invariably possesses, for it is sufficient for our purpose to assume that its meaning is not so fixed and definite as to forbid construction. The word used in the constitution is "indebted," but without ascertaining what the word "debt" means we cannot affix a meaning to that word, for its popular meaning is "placed in debt," or as Worcester puts it, "being in debt." It is obvious that a corporation owing no debt cannot be indebted.

Our leading purpose is, therefore, to ascertain what meaning the authors of the Constitution intended the word "indebted" to have, and we address ourselves to its accomplishment. It is clear that if the city should fail to perform its contract, the recovery would be for damages for a breach of contract, and not the contract rate of compensation, and, therefore, it cannot be true that the whole of the compensation is certainly demandable by the corporation with which it contracts. It may be that but a small part of even one year's compensation can be recovered. On the other hand, the failure of the water company to perform may put an end to the contract, and that would, of course, terminate all liability of the municipal corporation. There could be no action maintained against the city for the recovery of compensation under the contract without evidence that the water had been furnished, and this proves that there is no indebtedness until the water has been supplied in accordance with the terms of the contract.

The effect of the proposed contract is that the city shall be liable for water as it is furnished and not before. It is not until after the water has been furnished that there can be justly said to be a debt, for, while there might be a liability for damages, in case of a breach on the part of the city, there is certainly none under the contract until the city has received that for which it contracted. If it can pay this indebtedness when it comes into existence, without exceeding the constitutional limitation, then there is no violation of the letter, and surely none of the spirit of the Constitution. We are careful to say when the debt comes into existence, and not to say when it becomes due, for between these things there is an essential difference. The object to be accomplished by the amendment, the condition and necessities of our municipalities, as known to the authors of the amendment, and the just force of the language employed, authorize us to conclude that the inhibition of the Constitution does not apply to contracts for water to be paid for as the water is furnished, provided it is shown that the contract price can be paid from the current revenues as the water is furnished and without increasing the corporate indebtedness beyond the constitutional limit,

The question was very fully discussed in *Grant v. City of Davenport*, 36 Iowa, 396, where it was held that a contract entered into by the city for the supply of water for a term of years, at an annual rental, is one relating to the ordinary expenses of the city, and that the annual rental is not an indebtedness within the meaning of the Constitution. One of the illustrations used in the course of the opinion is so apt that we quote it: "Suppose a man having a family to support is without other means to do it, except his salary, which is adequate for that purpose. He is compelled to rent a house to live in, and by a contract for a term of years he can reduce its cost, and he therefore makes a lease for ten years at \$300 per year, or \$3,000 for the term, the rent being payable monthly, quarterly or annually. Has that man created an indebtedness of \$3,000?"

We have assumed that the supply of water is necessary to the welfare of the inhabitants of the municipality, and that it constitutes one of the items of current expenditure essential to the welfare of the corporation, and this assumption rests upon the facts pleaded in the answer. This distinguishes the case, as is well shown in *Grant v. City of Davenport, supra*, from the cases in which property is purchased or subscriptions made to the capital stock of railroad or other corporations. It is the items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, that constitute current expenses payable out of current revenues. The authorities agree that current revenues may be applied to such purposes even though the effect be to postpone judgment creditors. *Coy v. City Council*, 17 Iowa, 1; *Coffin v. City Council*, 26 Iowa, 515; *Grant v. City of Davenport, supra*. When the current revenues are sufficient to fully pay the current expenses necessarily incurred to maintain corporate life, there cannot be said to be any debt. We do not assert that a debt may be created even for current expenses, if its effect will be to extend the corporate indebtedness beyond the constitutional limit, but we do assert that where the current revenues are sufficient to defray all current expenses without increasing the indebtedness, there is then no corporate debt incurred for such expenses. To illustrate our meaning, suppose a laborer is employed on the first day of April to render services on the first day of May, that on the day of the employment there is no money in the treasury, but on the first day of May, when the services are rendered, there will be more than enough yielded by the current revenues, there is in such a case really no debt. Again, suppose that on the first day of April gas is needed for that month, and that on each day of that month the current revenues are sufficient to pay each day's gas bill, there will be no debt even though there was not sufficient money to pay the month's account in the treasury on the day the contract was made. Such contracts do not create a debt prior to the rendition of the services in the one case, or to the furnishing of gas in the other; they

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simply devote to current expenses current revenues. While, as decided in *Sackett v. City of New Albany, supra*, the debt cannot be made to exceed the constitutional limit even for current expenses, no matter how urgent, yet current revenues as they come in may be used to defray such expenses, and if they are sufficient for that purpose, then no debt is created.

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If a bond, note, or other obligation is executed, then, doubtless, a debt is created, for such things constitute evidences of indebtedness, but that is not the case here. So, if the consideration of the contract is received at once, instead of being yielded in the future or at intervals, then it might be said that there was a debt, but where there is nothing owing until after the thing contracted for is done or furnished, and that thing is a part of the necessary yearly expenses of the municipality, there will be no debt, if, when the thing is done or furnished there will be money in the treasury, yielded by current revenues, sufficient to fully pay the claim without encroaching upon other funds. This we understand to be the case made by the answer, and we think it a case not within the inhibition contained in the constitutional amendment.

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If a different view be taken from that which we maintain, startling results would follow in the application of the principle to other cases. Take, for instance, a merchant having a large number of clerks employed for a year each, and at a fixed salary, could such a merchant in making out his tax-list deduct the aggregate amount of all the salaries computed to the end of the year, on the ground that it constituted an indebtedness? Take, again, the same supposed case, and would any one say that the merchant's solvency was to be determined by taking into consideration the aggregate of the salaries that would be due his clerks at the end of the year? Take, for another example, the case of a private corporation actively engaged in business, could it be pushed to the wall on the ground that it was insolvent, by evidence that it had contracted with a large number of men for a year's service, and that the aggregate sum due at the end of the year would be much greater than the value of its property at the opening of the year? Take still another example, a municipal corporation — and here there need be no supposition — with its officers (some of them with terms of several years), its policemen and its firemen, is it indebted at the beginning of the year, for the grand aggregate of all the salaries to the end of all the terms? In the case of the merchant and of the private corporation, it certainly would be held, without hesitation or doubt, that if the current income or profit would discharge the obligations there would be no indebtedness; and this must be true of municipal corporations in cases where there will be money in the treasury, derived from current revenues, sufficient to pay for services rendered or things furnished, as part of the current corporate expenses, when the services are rendered or the things actually furnished. Expenses of such a character should be deemed

incidental expenses of the corporate business, and not debts, and as long, at least, as the current revenues will pay these expenses without taking from funds devoted to other purposes by command of the corporate charter what properly belongs to them, there is no indebtedness within the meaning of the Constitution.

Judgment reversed, with instructions to overrule the demurrer to the answer, and to proceed in accordance with this opinion.

SPILMAN v. CITY OF PARKERSBURG. 108

1891. 35 West Virginia, 605.¹

J. B. Jackson and J. A. Hutchinson, for appellants. [Citations of counsel omitted.]

B. M. Ambler, for appellee.

HOLT, J. Article 10, section 8, of the Constitution of West Virginia, provides that "no county, city, school district or municipal corporation shall hereafter be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; nor without at the same time providing for the collection of a direct annual tax, sufficient to pay annually the interest on such debt and the principal thereof within, and not exceeding, thirty-four years; provided, that no such debt shall be contracted under this section unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same." This suit involves this provision of the state constitution, and is a bill in equity, filed in the circuit court of Wood county on the 9th day of April, 1891, by B. D. Spilman, who sues on behalf of himself and all other citizens, residents and tax-payers in and of the city of Parkersburg, W. Va., against the city of Parkersburg and others, to restrain and inhibit the creation by the city of a debt for the erection of an electric light plant, alleged to be in violation of the above-mentioned section of the state constitution. The injunction was granted on May 25, 1891, until further order, and thereupon defendants gave notice of motion to be made on June 22, 1891, to dissolve, on which day the judge in vacation heard the motion, but overruled the same, refusing to dissolve the injunction, and from this order defendants below, plaintiffs in error, having obtained this appeal.

The facts are as follows: The total valuation of the taxable property on the 10th day of November, 1890, ascertained by the last

¹ Portions of opinion omitted. — Ed.

to restrain creation of debt by erection of electric light plant.

K: for case

assessment in the city for state and county taxes, was \$3,818,120 — five per cent of which is \$190,906. The then existing indebtedness of the city was \$190,000. On the 18th day of March, 1891, the Thomson-Houston Electric Company entered into a written contract of that date, whereby the electric company agreed to erect and install for the city a certain electric plant in accordance with specifications attached and made part of the contract, for which the city agreed to provide a suitable site, boiler and foundation for engine and dynamos, to pay all taxes on such apparatus and plant, and keep the same in repair, and also agreed to lease from the electric company such plant, furnished for street lighting, for a term of five years from the completion of the plant, and to pay at the end of each three months after its completion — that is to say, quarterly — the sum of \$1,625 for the use thereof, except that each succeeding payment was to be \$18.75 less than the preceding payment; and at the expiration of the term of five years the city has the right to buy the same at the price of \$1 — plainly a contract of purchase in legal effect; in fact so designated twice in a paper made part of the contract. No question connected with this transaction was submitted to the people; no vote was had thereon. In addition, there were in November, 1890, funds receivable from licenses, etc., the sum of \$17,444.53.

Blackstone (vol. 3, p. 154) says: "The legal acceptance of debt is a sum of money due by certain and express agreement." This is given in connection with his treatment of the action of debt.

has to decide case diff.

In the constitution it means any debt created by contract, express or implied; any voluntary incurring of any liability to pay in any manner or for any purpose, when the given limit of indebtedness has been reached. It may be a debt payable in the future as well as one payable presently; one payable upon some contingency, such as the delivery of property, as well as for property already delivered. When the contingency happens, the debt becomes fixed; it exists. It only differs from an unqualified promise in the manner in which it is created. And, since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else."

I do not deem it necessary to review *seriatim* the many cases on the subject, but rather, with their help, make a careful analysis of our own constitutional provision on the point.

1. What kind of indebtedness is prohibited? "If a man have any more or less of meaning in the term he makes use of than another, he does not talk with him to the same point." By the term "indebtedness," as here used, is meant the state of being by voluntary obligation, express or implied, under legal liability to pay in the present or at some future time for something already received, or for something yet to be furnished or rendered. This includes every kind of indebtedness, no matter in what manner created, or volun-

tarily brought about; or for what purpose, whether it be for municipal self-preservation or not; whether for pure air, pure water, good light, clean and convenient and safe streets and sidewalks; whether it be payable now or hereafter, payable quarterly or annually, or at any date running on for thirty-four years; whether for current expenses or fixed and definite debts or charges; whether for personal property or real property, leasehold or freehold. It is none the less indebtedness, created in some manner, and for some purpose, and is within the purview and the bar of the constitution. The confusion as to "current expenses" grows out of the failure to give due weight to another part of section 8, article 10.

2. Provision for payment. The city shall "at the same time provide for the collection of a direct annual tax sufficient to pay annually the interest on such debt, and the principal thereof within and not exceeding thirty-four years." If it is an item of current expenses or any thing else for the payment of which provision has already been made by levy laid, then it needs no other provision for its payment, and is not within the letter of the constitution; neither is it within its true meaning, for a draft on a fund already in hand, or by levy already made and provided, meets it and discharges it, so that no indebtedness arises. Thus it happens that the mere coincidence of current expenses being generally met and discharged by a fund in hand or already levied for is apt to mislead us into the view that indebtedness to pay current annual expenses is not within the prohibition; whereas, as we have seen, it is as absolutely prohibited as indebtedness created in any other manner or for any other purpose. This clause of the section is for the benefit of the creditor.

3. "Shall not hereafter be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." This provision is intended, by fixing a maximum limit in any and all events, to guard the people of the town from their own thoughtlessness or recklessness as to the burden put upon others, the large tax-payers being generally in the minority. It is intended to protect posterity by its limit as to time, and the tax-payers by its limit as to quantity.

4. "Not exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." This gives us a precise and definite standard by which to measure and ascertain the extent to which the indebtedness may go and we see that it does not include tithables, nor licenses, nor market fees, nor wharfage, nor police court fines, nor bridge tax, etc.

5. "Provided, that no debt shall be contracted under this section,

draft in

Amount of expenses which persons already made by levy laid within limits

unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same," plainly intending that no such indebtedness should be created in a corner, and without the knowledge and sanction of the tax-paying voters. It should be public, and run the gauntlet of full and free discussion. The people must be in earnest about this matter, or they would not by their organic law have barred out this debt-creating power with a triple hedge of safeguards. Its wisdom is unquestioned, and it has found or is rapidly finding its way into all state constitutions. It is plainly remedial; therefore the courts should uphold it with a steady hand, and construe and apply it in the advancement of the benefit sought for, and in suppression of the evil intended to be suppressed, and not give up the citadel to the first hard case, with bad law in its train, that demands its surrender. When we apply this section, thus read and construed, to the facts of the case in hand, we find this electric contract unable to penetrate even the outer wall.

R Sec provides
for a "debt"

1. What matters it what we call the thing contracted for, or the contract itself — lease, purchase or executory contract to lease or purchase — the thing thus created is a debt. It is executory; it may never be carried out. None the less it is a present binding agreement for the creation of a prospective debt.

2. The five per cent limit was already reached — it may lack a trifle, but virtually reached. The maximum measure is full. There is room for no more indebtedness. We are not permitted to piece on to the last aggregate tax value the \$17,000 or \$20,000 derived from city licenses, police fines, etc., in order to broaden the five per cent fund by enlarging the basis from which it is calculated, so as to make room for another debt. The constitution does not say so, but by what it does say excludes it. Why not take this fund, and buy the electric apparatus? Then there would be no debt. Not being capable of being used to enlarge the basis of calculation at the one end, neither can it be used to belittle the debt at the other, to make it insignificant, compared with the means of payment. To say that it is sufficient to pay with will not do. It must be applied; and when that is done the dispute is ended.

3. The people have had no say in the matter, they have not voted, nor had an opportunity to vote. The right of the city to create indebtedness is exhausted. The indebtedness amounts to \$190,000; the maximum limit is \$190,850.50 — leaving a margin of \$850.50.

4. On behalf of the city authorities it is urged with a good deal of force that this is a contract for light — one of the public necessities of city life; that to provide it is one of the urgent items of current expense; that a modern plant cannot be obtained by yearly contract: that it is so costly that no one will take the risk of supplying it in that way, but that the only obtainable terms are for a term of years, say five at the least, with quarterly or annual payments; and that as the

rent or installments of purchase-money fall due only as the compensation has been earned, the funds are by that time in the treasury with which to pay. All this sounds plausible enough, but the trouble with it is no levy has been made to meet it; no provision has been made or can be made for a direct annual tax sufficient to pay it, because the indebtedness already existing is up to the maximum allowed by law; and the contract does not restrict its source of payment to current funds derivable from sources other than taxation, such as licenses, police fines, etc., if that would avoid the trouble (as to which we express no opinion). That may be one of the sources of revenue already set apart or relied on to pay interest and principal of the \$190,000 of city indebtedness already existing. The city is rapidly increasing in taxable wealth, no doubt, but the constitution requires us to take as the basis the last assessment, and that is before us among the facts of the case, and we are not allowed to look ahead to some conjectural assessment not yet made.

I have examined all these cases of "necessary current expenses," as they are called, to which our attention has been directed; examined some of them in a perfunctory manner it is true, for no man nowadays can deliberately read every thing. [After citing a large number of authorities.] I need not stop to compare and distinguish; that has been well done in 1 Dill. Mun. Corp. (4th Ed.), § 133 et seq., and notes. And I have been led to the conclusion that the safe and sound construction is laid down in the much-considered case (three times before the court) of *Prince v. City of Quincy*, 128 Ill. 443 (1889); 21 N. E. Rep. 768. "The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution to carry on their corporate operations while so indebted upon the cash system, and not upon credit to any extent or for any purpose;" that is, payment must be provided for by levy laid, as distinguished from levy hereafter intended to be laid. "If an indebtedness of a city for current expenses and supplying water is forbidden as being in excess of the constitutional limit, the contract upon which it arose, though in itself executory, and creating only a contingent liability, is also forbidden. Prohibition of the end is prohibition of the direct, designed and appropriate means." This is the true construction. Any other would deprive these constitutional limitations of the force and efficiency indispensably required to prevent or cure the evil aimed at. To this conclusion the learned judge of the circuit court who entered the order complained of was brought, no doubt, after a careful consideration of all the authorities. I regard his conclusion as the only safe and sound one. We are working in constitutional harness in the piping times of peace, and do not feel called on to heed the exacting imperiousness of these higher laws of municipal self-preservation; but are forced to say what he has in effect said: "The city fathers, when the constitutional limit of voluntary indebtedness, as in this case, has been reached, must for the time cast about in search of the philoso

pher's stone, 'pay as you go.' Therefore, the order of the circuit court of Wood county, entered by the judge in vacation on the 22d day of June, 1891, overruling defendants' motion to dissolve the injunction awarded on the 25th day of May, 1891, is affirmed.

RAUCH v. CHAPMAN. 109

1897. 16 Washington, 568.¹

APPEAL from superior court, Klickitat county.

W. B. Presby and Huntington & Wilson, for appellant.

C. H. Spalding, for respondent.

REAVIS, J. Suit in equity, by a taxpayer of Klickitat county, against the county treasurer to enjoin the payment of certain county warrants, on the ground that they were issued after the constitutional limitation of county indebtedness had been incurred. The complaint, after other necessary allegations, set forth that the indebtedness of the county was more than one and one-half per centum of the taxable property therein, and no validation by vote of the electors had been made of any additional indebtedness. The answer stated, among other defenses to the suit, that the warrants in controversy were compulsory obligations imposed upon the county by the constitution and laws of the state; and specified some of the purposes for which the warrants were issued, among which were services for jurors in the superior court, witness fees in criminal proceedings, and sheriff's expenses in serving criminal process, and expenses incurred at the general state election. Plaintiff demurred to this affirmative defense, which demurrer was sustained by the superior court, and the court thereupon, among other facts, found the following, which are material to the consideration of the cause by this court:

"7th. That the total indebtedness of said county on the 9th day of March, 1893, and during all of the time of the issue of the warrants now called was \$85,441.92, and greatly exceeded the constitutional limit of indebtedness for said county, after deducting therefrom the cash in the treasury and all taxes levied and uncollected.

"8th. That the warrants now called by the county treasurer are the debts contracted after said 9th day of March, 1893, and were issued between the 2nd day of April, 1893, and the 26th day of July, 1893, during all of which time said indebtedness of \$85,441.92 was outstanding, and all of said warrants now called were and are in excess of the constitutional limit of indebtedness of said county and were issued without the assent of the voters of said county first had and obtained at an election held for that purpose, and they have not been validated by any vote of the electors of said county since their issue."

¹ Portions of opinion omitted. — En.

Judgment was rendered against the defendant and a permanent injunction issued against the payment of the warrants designated in the complaint. The defendant appeals.

1. Respondent maintains here that the payment of the warrants is inhibited by § 6 of art. 8 of the constitution of this state, of which the part material for consideration is as follows: "No county, city, town, school district or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, etc., without the assent of three-fifths of the voters therein voting at an election for that purpose. . . . Provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district or other municipal purposes;" and with the further proviso that any city or town shall be allowed to become indebted to a larger amount, not exceeding five per centum additional for supplying such city or town with water, light and sewers, when the works for supplying the same shall be owned and controlled by the municipality.

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When the constitution of Washington was adopted by the people of the newly-born state, the various county governments in the territory were recognized and their organizations and powers in a great measure continued. A large body of laws applicable to the new state, and which the people had for a long time been accustomed to, were found and continued in force. At this time some of the counties in the state were already indebted to an amount equal to the constitutional limitation of one and one-half per centum. The state itself inherited from its territorial form liabilities which very nearly equalled the limitation on state indebtedness prescribed in § 1, art. 8 of the constitution. The several counties, in addition to their organization for local purposes, and having conferred upon them the power to control and build county roads and bridges, erect public buildings for county purposes, and do many other things connected with the county as a corporation, also had imposed upon them certain duties by the state, and became governmental agencies, in the territory comprised in the county, for the state. Section 11 of art. 11 authorizes any county, city, town or township to make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws. Section 12 of the same article provides:

"The legislature shall have no power to impose taxes upon counties . . . or upon the inhabitants or property thereof, for county . . . purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The duty has been imposed upon the several counties in this state to provide for and pay certain necessary expenses for the enforcement of the criminal laws of the state and for expenses incurred at

Calif. Const.
Section 11
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the regular biennial state elections at which county and state officers are elected, and in carrying out other functions of the state; and also to make expenditures necessary for the existence of the county organization.

Section 8, art. 6 of the constitution, provides for biennial elections. Section 5, art. 11, also provides for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and other county officers as public convenience may require, and devolves upon the legislature the power to prescribe their duties and fix their terms of office, and to regulate the compensation of all such officers in proportion to their duties, and that for that purpose the legislature may classify the counties by population.

2. The objects of government have usually become multiplied with the development of complex and artificial conditions of society. There is much controversy at times among our stat smen as to the necessary and proper limitations upon the powers of government, both state and municipal, but all are agreed that certain necessary fundamental functions of government must always be expressed and exercised. The protection of life, liberty and property, the conservation of peace and good order in the state, cannot remain in abeyance. These functions of government are elementary and indestructible. The constitutional convention which framed, and the sovereign people who adopted, a republican form of government for the state of Washington, had these known principles in mind. Section 10 of the Declaration of Rights prescribes: "Justice in all cases shall be administered openly and without unnecessary delay;" and in § 22 it is declared: "In criminal prosecutions the accused shall have the right to . . . have compulsory process to compel the attendance of witnesses in his own behalf, have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. . . ." Provision is also made in the constitution for the organization and maintenance of the county government and, as we have seen, its administration is ancillary to that of the state. All these provisions of the organic law are alike declared to be mandatory. It would make these various provisions of the constitution contradictory and render some of them nugatory, if a construction were placed upon the limitation of county indebtedness which would destroy the efficiency of the agencies established by the constitution to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the constitution had such consequences in view. The judicial power was vested in the courts; the law must be administered through them; the jury is an essential part of the judicial procedure; justice must be administered without unnecessary delay between the citizens of the state; persons accused of crimes must have a speedy and impar-

fial jury trial; compulsory process must be served by the sheriff, witnesses are compelled to appear. The regulation of much of this procedure, and the compensation of jurors and witnesses, as well as of officers, in the counties, is vested in legislative discretion. Section 1 of art. 9 of the constitution declares: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders;" and § 2, same article: "the legislature shall provide for a general and uniform system of public schools." Our constitution seems to have added to the proper and essential functions of free government the maintenance of public schools.

3. The construction by some of the other courts of similar constitutional provisions may here be examined. In *Grant County v. Lake County*, 17 Ore. 453 (21 Pac. 447), the court, referring to the constitution of Oregon, said:

"The constitutional inhibition that no county shall create any debts or liabilities which shall, singly or in the aggregate, exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion, does not imply that all debts and liabilities against a county over and above that sum are necessarily obnoxious to that provision. To justify the court in finding the said conclusion of law, it should have found that the county created the indebtedness. Counties do not create all the debts and liabilities which they are under; ordinarily such debts and liabilities are imposed upon them by law. A county is mainly a mere agency of the state government — a function through which the state administers its governmental affairs — and it has but little option in the creation of debts and liabilities against it. It must pay the salaries of its officers, the expenses incurred in holding courts within and for it, and various and many other expenses the law charges upon it, and which it is powerless to prevent. Debts and liabilities arising out of such matters, whatever sum they may amount to, cannot in reason be said to have been created in violation of the provision of the constitution referred to, as they are really created by the general laws of the state, in the administration of its governmental affairs. Said provision of the constitution, as I view it, only applies to debts and liabilities which a county, in its corporate character, and as an artificial person, voluntarily creates."

This decision has been followed by the same court in *Wormington v. Pierce*, 22 Ore. 606 (30 Pac. 450); *Burnett v. Markley*, 23 Ore. 436 (31 Pac. 1050), and *Dorothy v. Pierce*, 27 Ore. 373 (41 Pac. 668).

The supreme court of California, in *Lewis v. Widber*, 99 Cal. 412 (33 Pac. 1128), observes:

"The respondent contends . . . that he should not pay petitioner's salary on account of § 18 of art. XI of the state constitution, which reads as follows: 'No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in

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any manner, or for any purpose, exceeding any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified voters,' etc. It is quite apparent, however, that this clause of the constitution refers only to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred, that is, an indebtedness which the municipality has contracted, or a liability resulting, in whole or in part, from some act or conduct of such municipality. Such is the plain meaning of the language used. The clear intent expressed in the clause was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur. But the stated salary of a public officer fixed by statute is a matter over which the municipality has no control, and with respect to which it has no discretion; and the payment of his salary is a liability established by the legislature at the date of the creation of the office. It, therefore, is not an indebtedness or liability incurred by the municipality within the meaning of said clause of the constitution."

[After citing various authorities, some of which are in conflict with the foregoing cases.]

We are constrained to rule that the constitutional limitation of county indebtedness in § 6 of article 8 of our constitution, does not include those necessary expenditures made mandatory in the constitution and provided for by the legislature of the state, and imposed upon the county; that the payment of these is a prior obligation, and other liabilities incurred by the county are subject and inferior to these primary obligations which must of necessity always continue.

The cause is reversed and remanded to the superior court of Klickitat county, with instructions to proceed in conformity to the views expressed in this opinion.

SCOTT, C. J., and ANDERS, DUNBAR and GORDON, JJ., concur.

BARNARD v. KNOX COUNTY.

1891. 105 Missouri, 382.¹

APPEAL from Knox Circuit Court.

H. M. Pollard, for appellant.

Charles D. Stewart and William Clancy, for respondent.

BLACK, J. This is a suit upon a duly protested warrant issued by the county court of Knox county, to George D. Barnard, dated the seventh day of May, 1885, for \$83.90, payable "out of any money in the treasury appropriated for the contingent fund." Barnard assigned the warrant to the plaintiff corporation.

The defense is that the debt, for which the warrant was issued,

¹ Arguments omitted. — Ed.

was created after the county court had issued warrants in excess of the revenue for 1885. In anticipation of this defense, it is alleged in the petition that though the county court had issued warrants in excess of the total revenue for that year, still the plaintiff's debt was created by law, and not by the act of the county court, and that the county debts for that year created by law were less than the county revenue for the same year. 11

The case was tried on the following agreed facts: "That, on the seventh day of May, 1885, the clerk of the county court of Knox county, Missouri, bought from Geo. D. Barnard certain books and stationery for \$83.90; that said books and stationery were suitable and necessary for the use of said clerk in his said official capacity; that thereupon said Barnard presented said bill, for said books and stationery, to the county court of said county, which said court audited and allowed said bill, and issued the warrant filed herein; . . . that there is no money in defendant's treasury now to pay the same; that, at the time of issuing said warrant, the said county court had issued warrants in excess of the total revenue of said county for the year 1885, raised by a levy of fifty cents on the hundred dollars, and from licenses and other sources; but excluding the warrants issued during the said year for support of paupers, and roads, and bridges, the remainder did not exceed such fifty cents on the hundred dollars; . . . that no vote of the people of the county, on the question of paying this warrant, or the creation of the debt evidenced thereby, has ever been had. The annual revenue of the county, to the extent of fifty cents on the one-hundred-dollar valuation, is now entirely consumed by the ordinary annual expenses of the county government."

The provisions of the constitution to be considered in the disposition of this case are found in sections 11 and 12, of article 10. The first provides: "For county purposes the annual rate on property, in counties having \$6,000,000 or less, shall not in the aggregate exceed fifty cents on the one-hundred-dollar valuation." The same section fixes the maximum annual rate of taxes for city and town purposes, and for school purposes, and contains these exceptions: *First.* The annual rate for school purposes may be increased to a designated amount by a majority vote of the taxpayers. *Second.* The rate may be increased by a two-thirds vote for the purpose of erecting public buildings. The rate allowed to each county is to be ascertained by the amount of taxable property therein, according to the last assessment. "Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing or bonds which may be issued in renewal of such indebtedness."

Section 12 declares: "No county . . . shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without

on warrant issued for goods bought at time when revenues for yr were exhausted.

const. limit on tax rate.

the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein," etc.

The statute makes it the duty of the county court at its May term, in each year, to divide the revenue collected, and to be collected, into five designated and described funds, one of which is a contingent fund not to exceed one-fifth of the total revenue of the county for county purposes for any one year; and each fund is declared to be a sacred fund for the purpose for which it is designated. R. S. 1879, secs. 6818, 6819.

In 1875 and prior thereto, many of the counties and cities in this state were burdened with debts, because of bonds issued in aid of railroads, some of which were never built, and on account of extravagance, frauds and defalcations of officials. To put an end to this state of affairs, the constitution adopted in that year denied to any county or city the right to thereafter take stock in, or loan its credit to, any railroad company or other corporations; and, by the two sections before mentioned, sought to bring the administration of county affairs to a cash basis. As said in *Book v. Earl*, 87 Mo. 246, the evident purpose of the framers of the constitution and the people in adopting it was to abolish, in the administration of county and municipal government, the credit system, and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and by limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury.

We do not understand counsel for the appellant to dispute these propositions; but the claim is made and pressed with much vigor, that section 12 does not include debts like that for which the warrant in question was given. The line of argument is this: As the statute makes it the duty of the county clerk to provide suitable books and stationery for his office (R. S. 1879, sec. 623), a debt created for such a purpose is not one incurred or created by the county court, but is a debt created by law, and that such debts are not within the prohibition. Authorities are cited which give support to such a distinction. *Grant Co. v. Lake Co.*, 17 Or. 453; *Barnard & Co. v. Knox Co.*, 37 Fed. Rep. 563, and *Rollins v. Lake Co.*, 34 Fed. Rep. 845. The case last cited, it may be observed, was reversed by the supreme court of the United States. 130 U. S. 662.

On the other hand the constitution of Colorado contains this provision: "And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above limited, unless," etc. The supreme court of that state said, when speaking of this clause: "The limitation being applicable to

debt not
within limit, as
in 1875

all debts, irrespective of their form, it follows that in determining the amount of county indebtedness county warrants are to be taken into account and any warrant which increases the indebtedness over and beyond the limit fixed is in violation of the constitutional provision, and void." *The People ex rel. v. May*, 9 Col. 80-98.

The circuit court of the United States in *Rollins v. Lake Co.*, *supra*, when having under consideration the clause of the Colorado constitution before quoted, held that warrants, issued for fees of witnesses, jurors, constables and sheriff, were not within the prohibition, because issued in payment of compulsory obligations; and, hence, it was no defense in an action upon such warrants that at the time they were issued the limit fixed by the constitution had been reached.

The supreme court of the United States when speaking upon this question in the same case said: "Neither can we assent to the proposition of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the legislature of the state, even if it can be said correctly that the compulsion was to incur debt; and the legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the constitution provided for certain county officers, and authorized the legislature to fix their compensation and that of other officials, affect the question. . . . In short we conclude that article 6 aforesaid is a limitation upon the power of the county to contract any and all indebtedness including all such as that sued upon in this action; and, therefore, under the stipulation already set forth, the county is entitled to judgment." *Lake Co. v. Rollins*, 130 U. S. 662.

A clause in the constitution of Illinois declares that "no county, city, etc., shall be allowed to become indebted in any manner, or for any purpose," beyond a stated amount. Yet the decisions of the supreme court of that state recognize no such distinction as that sought to be made in the case at bar. The result of the decisions of that court is, that it can make no difference whether the debts be created for necessary current expenses or for something else. *Prince v. City of Quincy*, 105 Ill. 138; s. c., 105 Ill. 215.

The supreme court of Iowa when speaking of the same clause in the constitution of that state says: "The language of this provision is very general and comprehensive. It includes indebtedness incurred in any manner or for any purpose." *City of Council Bluffs v. Stewart*, 51 Iowa, 385. It is true the clauses in the constitutions of the states just named prohibit the incurring of indebtedness beyond a specified per cent. of the assessed value of the taxable property, while in our constitution the prohibition is against the incurring of an indebtedness in excess of the revenue of the partic-

ular year. But we do not see that this difference affects the question in hand. The object of all these provisions is to fix a limit to county and municipal indebtedness.

Our constitution, it will be seen, first limits the rate of taxation for county purposes to fifty cents on the one-hundred-dollar valuation in counties like the one in question. This rate may be increased by the assent of the qualified voters for the purpose of erecting public buildings, but it cannot be increased even by such assent for any other purpose.

We have held that a county court cannot levy a tax in excess of the fifty cents for any purpose, except for the purpose of erecting public buildings, and for the purpose of paying indebtedness existing at the date of the adoption of the constitution. *Arnold v. Hawkins*, 95 Mo. 569; *Black v. McGonigle*, 108 Mo. 192. The maximum limit of the rate of taxation for county purposes being thus fixed, section 12, to repeat, declares: "No county, city . . . shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year." As to counties the only exception is, that with the assent of the voters the expenditures may be increased for the erection of a courthouse or jail. The language just quoted is clear and explicit and construes itself; it is broad and comprehensive as to the character of the indebtedness. It includes indebtedness created in any manner or for any purpose.

This strong and comprehensive language admits of no distinction between debts created by a county court and debts created by law. In a sense all county debts are created by law; for the counties possess those powers and those only which are conferred upon them by the constitution and laws of the state. While it is the duty of the county court to care for paupers and insane persons and to build bridges and repair roads, still the county court is governed by the statute in the performance of these duties. Debts incurred for such purposes may be called debts created by law as well as debts incurred by the county clerk for books and stationery.

Nor does it make any difference that the debt in question was created by the clerk instead of the county court. The clerk in the purchase of the books and stationery acted as a county officer; the debt incurred by him, if he did not exceed his authority, is just as much a county debt as one incurred by the county court. The law confers upon various county officers the power to create debts for designated purposes, but the debts are all county debts when chargeable to the county. The county clerk, county court and other county officers must take notice of these constitutional limitations, and exercise the powers conferred upon them in subordination to such restrictions. To hold otherwise is to say the clerk and other officers may execute statutory powers in excess of constitutional restrictions, and thus make the statute laws override the constitution.

Dist. bet debts
created by law &
county court

It is, of course, a hardship to the plaintiff to declare this warrant worthless, but we cannot dispose of the question on any such surface view of the matter. The constitution seeks to protect the citizen and taxpayer, and their rights are not to be overlooked. It is the duty of persons dealing with counties and county officials, as well as of county officials themselves, to take notice of the limit prescribed by the constitution. 1 Dill. Munic. Corp. [4 Ed.] sec. 134a. Soliciting agents, contractors and others who deal with county officials must see to it that the limit of county indebtedness is not exceeded, and, if they fail to do this, they must suffer the consequences. Unless this is so there is an end to all effort to bring about an economical and honest administration of county affairs. If this scheme of county finances built up by the constitution is a mistake, or if it produces great hardships in some counties, the remedy is with the people and not with the courts. "What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require." Cooley on Const. Lim. [5 Ed.] 67.

The plaintiff insists that there is no substantial difference between this case and *Potter v. Douglas Co.*, 87 Mo. 240. In that case the plaintiff sued Douglas county for services performed by him as jailer of Greene county, in keeping, boarding, clothing and taking to court prisoners. The indebtedness was incurred under section 6090, Revised Statutes, 1879. The agreed statement showed "that, at the time the fee bill was presented to the county court, the revenue for said years was expended, and the same could not be paid without issuing warrants in excess of the income and revenue for said years." On this statement we held the plaintiff could recover. It is to be observed that the agreed statement in that case did not show that the revenues had been expended when the indebtedness was incurred. For aught that appears there may have been revenues unexpended and set apart to the proper fund when the indebtedness was contracted. Our opinion, however, is not placed on any such ground. It is placed upon grounds which would include the case in hand, and which are inconsistent with what has been said on the present occasion. There is, of course, a difference between the facts in that case and the facts in the present one, but the constitution takes no notice of such differences. That case is, therefore, overruled.

Now the agreed statement in this case does not, in terms, say that the contingent fund set apart for 1885 had been exhausted when the books and stationery were purchased; but it does show that the warrant was issued at the date of the purchase, and that at that time the county court had issued warrants in excess of the total revenue for that year. This statement must be taken in connection with the petition which is framed upon the theory that the whole of the revenue had been consumed, unless warrants issued for the support of paupers and for building bridges and repairing roads are to be excluded.

We think it sufficiently appears that the contingent fund had been consumed when the debt sued for was incurred. Indeed, this proposition is not questioned in the briefs.

The warrant was issued in violation of the constitution, and is void. Judgment affirmed. BARCLAY, J., absent; the other judges concur.

DAVIS v. CITY OF DES MOINES.

1887. 71 Iowa, 500.

APPEAL from Polk Circuit Court.

The petition sets forth that the defendant is already indebted to the full constitutional limit; that the plaintiff is the owner of certain land fronting on one of the streets of the city, and that the city, by its officers, entered into a contract with one McCauley to construct a sewer in said street, and to pay him therefor by assessing the contract price thereof against the adjacent property; that the municipal authorities are about to make said assessment, and charge the same upon the lots, and proceed to collect the same of said owner. It is prayed that the said contract be cancelled and declared void, and the defendant be enjoined from in any manner attempting to enforce said contract. The defendant, by its answer, denies that it has contracted, or proposes to contract, an indebtedness for the construction of said sewer. There was a demurrer to the answer, which was overruled, and the plaintiff appeals.

Henry S. Wilcox, for appellant.

James H. Dietrick and Hugh Brennan, for appellee.

ROTHROCK, J. The question to be determined is, did the contract in question create an indebtedness against the city? A copy of said contract is exhibited with the answer. So far as the said contract purports to create an obligation against the city, it is as follows: "The said P. H. McCauley agrees and hereby undertakes to do and perform said work in accordance with the plans and specifications, at the following rate or price, to-wit: one dollar and seventy-four cents per lineal foot or square yard, which price shall cover the cost of the entire work. The said cost is, under the law and ordinances of said city, to be assessed against the private property adjacent to or fronting on the street upon which said improvement is made, and a part thereof, to-wit: in seven annual installments, as provided by the law and ordinances of the city, with six per cent interest. Said assessment is payable as follows: When such assessment is made, and any portion of the work completed and accepted by the city, certificates thereof shall be made out showing the amount levied against each piece of property, and the same shall be delivered to said P. H. McCauley, and the same shall be received by him in

full payment for said work or improvement for the payment of which a special assessment is required by the law and ordinances of said city, and delivered to said P. H. McCauley or order. Said P. H. McCauley agrees to accept said certificates in full payment for any and all work performed by him under his contract, and to collect the same by any of the methods provided by law, and at his own cost and expense; and it is expressly agreed, by and between the parties to this contract, that, upon the issuing of certificates to said P. H. McCauley for any and all work done under this contract, the same shall be received by him in full payment therefor, without recourse to the city of Des Moines, Iowa."

It is provided by section 3, article 11, of the constitution, that "no county or other political or municipal corporation shall be allowed to become indebted in any manner, for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax-lists previous to the incurring of said indebtedness."

It seems to us that the contract in question does not create an indebtedness against the city. There is no doubt that the city is authorized by law to make special assessments for improvements of this character upon property adjacent to the improvements. Such are the plain provisions of our statute. See chapter 162, Laws 1878, and section 16, c. 168, Laws 1886. The contract involved in this case expressly provides that the certificates issued by the city shall be accepted by the contractor in full payment for his work, without recourse on the city. The city can never be held liable to any action for the construction of the sewer. Its resources cannot be affected thereby. Its contract is fully and completely performed by ascertaining the amount properly chargeable to the adjacent property, and the issuance of assessment certificates to the contractor.

We think the demurrer to the answer was properly overruled.

*Affirmed.*¹

ROBINSON, J., IN TUTTLE v. POLK.

1894. 92 Iowa, 433; pp. 437-8; pp. 441-2.

ROBINSON, J. . . . The authority under which the city acted in entering into the agreement is found in chapter 168 of the Acts of the Twenty-first General Assembly, enacted in 1886. The city of Des Moines is within the provisions of that act. It authorizes con-

¹ As to whether the city would be liable to the contractor if the city officers neglect to make the assessment (or if the city officers neglect to collect the assessment in cases where the duty of collection rests upon the city); see conflicting authorities cited in *German-American Savings Bank v. City of Spokane*, 1897, Supreme Court of Washington, 49 Pacific Reporter, 542.

tracts for paving and curbing streets and constructing sewers in cities to which it applies, and provides for the issuing of bonds in payment. The cost of the improvement is to be assessed upon the property fronting or abutting upon it, and placed on the tax list of the county, and is payable at the office of the county treasurer. All money received from the assessments is to be appropriated to the payment of the interest and principal of the bonds, or certificates, if any are issued under section 16 of the act. The section is as follows: "Section 16. If by reason of the prohibition contained in section 3, article 11 of the constitution of this state it shall at any time be unlawful for any such city to issue bonds as by this act provided, it shall be lawful for such city to provide by ordinance for the issuance of certificates to contractors, who under contract with the city shall have constructed any such improvement, in payment therefor, each of which certificates shall state the amount or amounts of one or more of the assessments made against an owner or owners and lot or lots on account and for payment of the cost of any such improvement, and shall transfer to the contractor, and his assigns, all of the right and interest of such city to, in and with respect to every such assessment, and shall authorize such contractor and his assigns to receive, sue for, and collect, or have collected, every such assessment, embraced in any such certificate, by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act." The certificates in question were issued under the authority of that section and chapter 44 of the Acts of the Twenty-second General Assembly. The last named act is only designed to cure defects, and provide for the reassessment and relevy of special taxes in certain cases, and does not otherwise add to the power, if any, conferred upon the city by section 16, quoted, to create indebtedness. There is nothing in that section which makes the city in any manner liable for the payment of the certificates. It merely authorizes the transfer to the contractor or his assignee of all the right and interest of the city in the assessment, in payment of the improvements made. The plain legislative intent was to provide a means for paying for improvements contemplated by the act without the incurring of any liability on the part of the city, acting under the provisions of section 16.

It is said that the provision of the constitution in question was intended to protect the taxpayer from the reckless and corrupt acts of public officers, that the municipal corporations and the citizens thereof are one and the same, and that debts contracted by the corporation are debts of the citizens and taxpayers. There is a sense in which that is true, but it is not recognized in the constitution. That does not limit the amount which may be levied, in the form of taxes and special assessments, upon the property within the state. It recognizes the county and other political and municipal corporations

as being distinct entities. Although none can incur an indebtedness in excess of five per centum of the value of the taxable property within its limits, yet the same territory, and, therefore, the same property, may be included within the limits of different corporations, as those of a county, city, or town, and school district, and be subject to taxation for the debt of each. Strictly speaking, such a debt is not a lien upon any taxable property, nor a claim against any taxpayer, until a levy or an assessment has been made. Some property may be within the corporate limits when a debt is created, and without them when the tax for its payment is assessed. So the property owner, whose influence helps to create the debt, may have no property taxable within the corporate limits when the debt becomes due. It seems clear that in such cases the debt of the corporation is not primarily the debt of the owners of property within its limits, and the case is not different, in a legal sense, when an assessment is made for the payment of the debt at the time it is created, although in that case each property owner who has property subject to assessment may be liable for a definite portion of the debt. In this case the city attempted to enter into a contract for paving, for which a fixed compensation was to be paid. The contract did not require any payment to be made by the city, excepting in certificates, but provided that the agreed price should be collected by means of assessments. The paving of the streets is one of the purposes for which the city exists, and for which it might have assumed liability, had its debt not reached the constitutional limit; but it guarded against the assuming of any liability, and placed the burden of the improvement upon the owners of property which fronted upon it. That right was given by a statute which was especially designed to authorize the making of such improvements without cost to the city, and we find nothing to prevent giving it full effect. We do not think there is any sufficient reason for holding that the city is in any respect liable for the amounts represented by the certificates, nor that the obligation of the taxpayer is the debt of the city. In *Davis v. City of Des Moines*, 71 Iowa, 500, 32 N. W. Rep. 470, it appeared that a contract for the construction of a sewer was entered into, similar to the one attempted to be made in this case, and under the same statute. It was held that an assessment certificate issued pursuant to the contract to pay for the improvement did not create an indebtedness against the city. We conclude that section 16 of the Act of the Twenty-first General Assembly in question is not unconstitutional, as attempting to provide for the creation of a debt in excess of the amount authorized by the constitution.

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ADDYSTON PIPE & STEEL COMPANY v. CORRY. 113

1900. 197 Pa. 41.

See also 1900

MITCHELL, J.¹ The city of Corry formerly contracted for the building of a sewer, the contractor performed the work, the city accepted it, and is in possession, but it now seeks to escape payment on the ground that its contract was *ultra vires*. If this is true the overruling requirements of public policy compel us to hold the defense good in law, however unjust and dishonest in morals. But the invalidity of the contract should be clearly established, and the burden of showing it is on the city. This being a case stated all facts not contained in it must be assumed not to exist, and the consequences must fall on the party having the burden of proof.

Sp. ass. invalid

The contract called for the building of a sewer for the price of \$57,000, \$9,300 of which was to be paid out of the general sewer fund, and the remainder to be assessed upon the property benefited by the contemplated sewer. The city by ordinance appropriated the \$9,300 out of the general sewer fund and it was duly paid, so that it is only material to the present inquiry so far as it may bear upon the validity of the contract at the time it was made. By ordinance and proceedings in court the rest of the contract price was duly assessed upon the property benefited, including that which abutted on the line of the sewer, and some that did not. The city collected all of the assessments of the former class and many of the latter, and has paid out all the orders on the treasurer given to the contractor so far as the funds collected would go. But some owners of non-abutting property having resisted payment, the assessments of that class were held invalid, and the funds not being produced from the expected source, payment of the outstanding orders was refused and the holder brought this suit upon them.

Validity of contract

At the date of the contract in 1891 it is admitted that the debt of the city of Corry was in excess of its constitutional limit, but several years having been consumed in the building of the sewer the debt meanwhile had been so far reduced that the balance due on this contract could be paid without transgressing the constitutional restrictions. On this point, however, the court below rightly held that the validity of the contract must be determined as of the time it was made. The question therefore is, did this contract increase the debt of the city of Corry at the date of its execution.

Debt of city

As to the \$9,300 to be paid by the city out of the general sewer fund, there is nothing in the case stated to show that the amount was not then in the city treasury or payable and subsequently paid out of

¹ Statement of facts and opinion omitted. — Ed.

the current revenues. This item therefore did not increase the city's indebtedness in the prohibited sense. There is no constitutional restriction on municipal expenditure, provided it is paid as it goes. What is prohibited is the incurring of debt. If the city has the money on hand or provides at the time a present means of raising it otherwise than by loan, it may contract for expenditure without restriction.

In Appeal of the City of Erie, 91 Pa. 398, GORDON, J., quoting from *Grant v. City of Davenport*, 86 Iowa, 396, says: "When a contract made by a municipal corporation pertains to its ordinary expenses and is, together with other like expenses, within the limits of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts." And he adds: "If the contracts of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them, however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created." This is quoted with approval by our Brother DEAN in *Wade v. Oakmont Boro.*, 165 Pa. 479, 488.

It is not, however, always possible to adapt present action to future results with absolute precision, and if means are adopted which in good faith, according to reasonable expectation, will produce a sufficient fund, the contract entered into on the faith of them should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure to produce the full result. Thus if a city at the time of making a contract levies a special tax in good faith supposed to be adequate to meet it, but in consequence of fire or flood or decline in values the result is an insufficient fund, it cannot be held that the contract good at its inception would thereby be made bad. The constitutional restriction was not intended to make municipalities dishonest, nor to prevent those who contract with them from collecting their just claims, but to check rash expenditure on credit, and to prevent loading the future with the results of present inconsiderate extravagance.

In the present case the city of Corry provided the contract price of the sewer by an appropriation of money which, as already said, we must assume to have been in the treasury, and by assessments upon the property benefited. There is nothing to indicate that these assessments were not in good faith and reasonable expectation supposed to be adequate to produce the required fund and offered and accepted by the contracting parties in the mutual belief in their validity. So far as they were upon abutting property they fulfilled their intended purpose. The distinction in regard to non-abutting property had not then been made, and was not in contemplation of either side. When it was determined that this part of the agreed means of payment would be unavailable, the loss should in equity and justice fall on the city which

has received the full consideration stipulated for, and to this extent paid nothing.

The cases on this subject are conflicting. See Dillon on Municipal Corporations (4th ed.), secs. 480-482 and notes. They show that there is no disposition of the question which is wholly free from difficulty. We have preferred to follow the line which we think not inferior in just legal reasoning, while clearly superior in the honesty and justice of the result reached.

There is another view of this particular case which leads to the same conclusion. As already said the building of the sewer occupied several years. During the progress of the work differences arose in regard to payments, and in 1895 a compromise was agreed upon between the contractor and a committee of the city council, subsequently ratified by ordinance, whereby the outstanding orders in favor of the contractor were canceled, and new orders issued against which the city stipulated that no defense should be made by it. Among such new orders are those now sued on. The validity of the assessments on non-abutting property was then undecided. The contractor agreed to furnish additional counsel and aid in the prosecution of a test case on this subject, and to abate the sum of \$550 from his claim, should such suit be decided against the city. This compromise was carried out by the parties except as to the payment of the orders involved in this suit. No reason is shown why it was not entirely valid and binding. The case stated does not show that the stipulated payments on these orders could not at that time have been made from money in the treasury, or from current revenue, even if that fact had been a necessary element in the validity of the compromise.

Judgment reversed and judgment directed to be entered for the plaintiff for \$6,000 with interest.¹

SECTION VII.—*Power to acquire, manage, and dispose of property.*

CLAYTON v. HALLETT.

1902. 30 Colo. 231.

GEORGE W. CLAYTON by his last will and testament gave to the Corporation of Denver all the residue of his estate in trust to establish and maintain a college for the education of poor white male orphan children.

¹ See also *Lake County v. Rollins*, 130 U. S. 662; *Farguharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717; *La Porte v. Gamewell F. A. T. Co.*, 146 Ind. 466, 45 N. E. 588, 85 L. R. A. 686, 58 Am. St. Rep. 369; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 106 Am. St. Rep. 201; *Reynolds v. Waterville*, 92 Me. 292, 42 Atl. 558; *McGillivray v. Joint School Dist.*, 112 Wis. 354, 88 N. W. 310; *Conner v. Nevada*, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314.

Compromise also
valid

16 cases

114

The next of kin filed this complaint to have the residuary clause declared null and void.¹

STEELE, J. . . . It may be stated as a general proposition of law, that a corporation capable of holding real estate is capable also of executing a charitable trust, unless the statute or the articles of incorporation prohibit it. And unless specially restrained, municipal corporations may take and hold property in their own right by direct gift, conveyance or devise, in trust, for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects. So, in this case, unless the objects of the incorporation of the city of Denver are foreign to the purposes expressed in this trust, the city of Denver is capable of taking the property and executing the trust in accordance with the provisions of the will.

It is said that by the constitution and laws of Colorado the municipalities of the state are inferentially prohibited from maintaining schools; that that function of government is left to the school districts of the state; and that this provision of the will of George W. Clayton should not be enforced because of the policy of the state so expressed. As far as the policy of the state is concerned, the act of 1901 enabling the city of Denver to take gifts by devise declares it to be in favor of the city's accepting such devise.

Gilbert Hatheway died in 1871, and by will gave to the corporation of the village of New Baltimore fifteen thousand dollars to be used in the erection of a school building to be used as a high school and to be suitable for that purpose, and to be known as the Hatheway School. The legislature of Michigan, in the year 1873, passed an act enabling the village to accept the gift. In the case of *Hatheway v. Sackett*, 32 Mich. 99, a case in which this legacy was under consideration, the court said: "They (the plaintiffs in error) insist that our general state policy is opposed to all connection between village government and school administration, and then seek to infer that this general policy is applicable to this specific case. But the act of 1873 negatives this inference; because, whatever its force as an enabling act, it is, at least, a direct and explicit expression of the sense of the legislature that in truth it is not impolitic for the village of New Baltimore to accept this very bequest. We have, then, distinct and solemn evidence that the legislature have considered it entirely consistent for the corporation to have the identical legacy in question."

It is said by Judge Dillon, in his work on Municipal Corporations, that "Municipal and public corporations may be the objects of public and private bounty. This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character

¹ This short statement is substituted for that of the Reporter. Only so much of the opinion as discusses the power of a municipal corporation to take property in trust is given. — ED.

No power to maintain schools

rest upon compact populations residing within restricted and narrow limits, to meet which property and revenues are absolutely necessary, and, therefore, legacies of personal property, devises of real property, and grants or gifts of either species of property directly to the corporation or for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten the burden of its citizens, are, in the absence of disabling or restraining statutes, valid in law. Thus, a conveyance of land to a town or other public corporation, for benevolent public purposes, as a site for a school house, city or town house, and the like, is based upon a sufficient consideration, and such conveyances are liberally construed in support of the object contemplated." (§ 566.)

And in *Perry on Trusts*, § 43, it is said: Municipal corporations cannot "act as trustees if they are forbidden to take and hold lands, as by the statutes of mortmain, nor if they are not empowered to take the property. But if the trusts are within the general scope of the purposes of the institution of the corporation, or if they are collateral to its general purposes, but germane to them, as if the trusts relate to matters which will promote and aid the general purposes of the corporation, it may take and hold, and be compelled to execute them, if it accepts them. Thus towns, cities, and parishes may take and hold property in trust for the establishment of colleges, for the purpose of educating the poor, for the relief of the poor, though not paupers, by furnishing them fuel at a low price, and for the support of schools, or for any educational or charitable purposes within the scope of its charter." And cases are cited in support of the text.

Charles McMichen, a citizen and resident of Cincinnati, made his will in 1855, and died in 1858 without issue. He devised certain real and personal property to the city of Cincinnati and its successors, in trust, forever, for the purpose of building, establishing, and maintaining, as far as practicable, two colleges for the education of boys and girls. The supreme court of the United States, in *Perin v. Carey*, 24 Howard, 465, held, that this was a valid devise, and that "the city of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMichen." Upon this subject of the authority of municipal corporations to administer a trust, Mr. Justice Wayne, speaking for the court, said: "The law is, that where the corporation has a legal capacity to take real or personal estate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may do. It is true that if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself being good, will be executed under authority of a court of equity. Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institutions,

but collateral to them, as for the benefit of a stranger or another corporation. But if the purposes of the trust be germane to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, where is the law to be found which prohibits the corporation from taking the devise upon such a trust in a state where the statutes of mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine, or prohibits the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and powers."

Stephen Girard died in the year 1831, and by his will devised and bequeathed in the city of Philadelphia the residue of his estate in trust for the establishment and support of a permanent college for the education of poor white male orphans. This devise was sustained by the Supreme Court of the United States, and the court held, that "The corporation of the city of Philadelphia is capable of taking under a devise of real and personal estate in trust for the establishment and support of a college for poor orphan boys, and can execute the trust. *Vidal v. Girard*, 2 How. 61.

Bryan Mullanphy died in the year 1851, and by his will devised and bequeathed the undivided one-third of his property to the city of St. Louis, in trust, "to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way to settle in the West," and this trust was sustained by the Supreme Court of Missouri, in the case of *Chambers v. City of St. Louis*, 29 Mo. 543.

It is said that the legislature has not granted to the city of Denver authority to acquire and hold real and personal property, except as it is necessary for the public uses of the inhabitants thereof, and that for that reason the bequest and devise to the city of Denver is an invalid one and should be declared void, and the court should hold that as to his residuary estate George W. Clayton died intestate. The decisions are, as we have cited, to the effect that where municipal corporations are organized for purely governmental purposes, they may accept gifts for charity if the charity is germane to the general purposes of the organization. The general purpose of all municipal corporations is to promote the general welfare and happiness of the people residing therein. Such was the purpose of the legislature in granting to the city of Denver its charter. To say that because this devise is for the benefit of a class of the inhabitants of the city of Denver or elsewhere it is a private and not a public charity is contrary to the decisions upon the subject.

The sections of the charters of Philadelphia, Cincinnati, and St. Louis quoted in the cases cited show that the charters of these cities and the charter of Denver are practically alike. In each is contained

the general provisions found in nearly all charters, that tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness. If the city of Philadelphia can hold property in trust for the education of poor white male orphans, and the city of Cincinnati can lawfully execute a trust for the education of boys and girls, and the city of St. Louis can, without violating its organic law, administer a trust "for the purpose of furnishing aid to poor emigrants" passing through the city, there is no apparent reason why Denver, under her charter, which provides for the entertainment of visitors (trade), for the encouragement of manufactures (industry), for the assistance of charitable organizations, and for the good order, health, good government, and general welfare of the city, cannot accept and execute a trust for the education of poor white male orphans.

Furthermore, the legislature, by the act of 1901, clothed the city of Denver with full power and authority to accept the trust created under the will, and to administer it according to the terms and provisions of the devise. It is said that this devise must be construed with reference to the capacity of the city at the time of the death of George W. Clayton; that the estate, at the time of George W. Clayton's death, vested either in the heirs or in the trustee named. We cannot agree with counsel in this contention. The devise to the trustee is in the nature of an executory devise. It is to take effect when the executor, Moses Hallett, or an administrator with the will annexed, marshals the assets of the estate, selects a site, and erects a building, in accordance with the provisions of the will. Then, and not till then, in our judgment, is the city of Denver called upon to accept or reject the trust imposed.

Here, then, is a public charity. Through it Mr. Clayton seeks to bring the minds and hearts of poor orphans under the refining influence of education. After making such provision as he thought proper for the natural objects of his bounty, he has selected, as deserving of his benevolence, the poor white orphan boys of Denver and Colorado, and has devoted the residue of his great fortune to the erection and support of a permanent college for their free instruction and maintenance, that they may become useful citizens and honorable members of society. It is an indulgent, edifying, and worthy charity. It will lessen Denver's burdens of government. To thousands of poor orphan boys it will be a blessing forever, and it will be by them forever blest.

Our conclusions, therefore, are: That "the education and preferment of orphans," being one of the subjects mentioned in the statute of 43d Elizabeth, chapter 4, is to be regarded in Colorado as a public charity. That, there being power vested in the executor and the board of trustees of the college to select the objects of the testator's bounty, the trust created by the fourteenth section of the will is valid. That the city of Denver, in its corporate capacity, has power to accept the

trust created, and to execute it in accordance with the intention of the testator as declared in the fourteenth section of his will.

For the reasons given, the judgment of the district court is affirmed.¹

Affirmed.

SCHNEIDER v. MENASHA. 115

1903. 118 Wis. 298.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Taxpayer's action to restrain defendant city and its officers from consummating a contract to purchase a tract of land just outside the corporate limits of the city, from which to obtain stone for manufacturing crushed rock for city purpose. The complaint contained all the necessary allegations to raise the question of whether the city possessed power to do the act sought to be prevented. The defendant city answered that the purpose of purchasing the land was to obtain a supply of crushed rock for use upon the city streets, and that such land was conveniently located for such purpose. A motion for a preliminary injunction was denied, and plaintiff appealed.²

MARSHALL, J. Respondents urge in support of the order appealed from the doctrine that, respecting an executed contract, only the state can invoke the doctrine of *ultra vires* to challenge the right of a corporation to exercise power beyond the scope of its charter. That doctrine is applied quite generally to private corporations. It is not, however, to public corporations. The numerous cases decided by this court, establishing the right of taxpayers to intervene to prevent the unlawful disposition of public money or to compel its restoration, clearly indicates that. *Webster v. Douglas Co.*, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451; *Northern T. Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460. It is deemed so unsafe to allow the officers of a municipality to bind it beyond the scope of its powers, that all persons are held firmly to the rule that, in dealing with such a corporation, they are presumed to know the limit of its authority and act at their peril. The result is that no one can successfully plead ignorance to save himself from loss in dealing with a municipality as to matters expressly prohibited, nor as to any matter beyond the scope of corporate authority except in case his money or property has actually been used for legitimate corporate purposes. In that event, on equitable grounds, the court will afford a remedy to the extent of the corporate benefit, but no further. *Thomson v. Elton*, 109 Wis. 589, 85 N. W. 425; *Beach, Pub. Corp.* § 219.

Taxpayers can prevent ultra

¹See *Dailey v. New Haven*, 60 Conn. 314.

²Arguments omitted. — Ed.

Ans. Counsel for appellant bring to our attention a number of authorities to sustain the contention that a city cannot purchase real estate outside of its corporate limits, but none that seems to really touch the precise question here presented, which is this: Can a city, under its general power to "purchase and hold real estate sufficient for the public use, convenience or necessities" (charter of Menasha,—sec. 4, subch. XV, ch. 123, Laws of 1891), purchase real estate outside of its corporate limits convenient for use in obtaining a supply of crushed rock to be used upon the city streets?

Ans. The city of Menasha had express authority to improve its streets. It had express authority to purchase such real estate as it deemed reasonably necessary or convenient for the city's use. It possessed, by implication, all the powers reasonably necessary to the proper exercise of such express powers, and those essential to the objects and purpose of its corporate existence. *Trester v. Sheboygan*, 87 Wis. 496, 58 N. W. 747. The acquirement of a supply of crushed rock for use upon the city streets was a legitimate city purpose. That is conceded. It must be conceded, also, that to obtain such supply by the purchase of real estate and manufacturing the crushed rock therefrom within the city limits would be a legitimate exercise of corporate power. Would an act which does not involve the exercise of sovereign authority,—one in the exercise of the ordinary business functions of a city inside the city limits,—cease to be such if performed just over the boundary line or within a convenient distance from the city?

Ans. The language of the charter is general. Looking at the literal sense thereof, the city may do business outside its boundaries so far as reasonably necessary to carry out the express powers granted to it, as well as within. It is admitted that a city may own realty outside its limits for purposes which are essential to its welfare, as for a cemetery or pest-house. On that *2 Dillon, Mun. Corp. (4th. ed.) § 565*, is cited. Judge Dillon, as we shall see later, some time after the text of his work was written, successfully maintained much broader authority for cities. Counsel suggests that if the city can go outside its boundaries for a stone quarry because the corporation needs crushed rock for use upon its streets, it can go to any distance therefor, and that if it can go into the rock crushing business, it can also go into the business of building rock crushers. That argument, though plausible, lacks the merit of novelty, as will hereafter be seen. As an authority peculiarly in point, we are referred to *Duncan v. Lynchburg*, 34 S. E. 964, 48 L. R. A. 381, decided in the supreme court of appeals of Virginia. At first glance the case seems to strongly support counsel's side of the controversy, but upon a careful study thereof it appears that the powers of the charter of Lynchburg were much less liberal than those of the respondent city. Moreover, we find that the authorities cited do not support the extreme views of the Virginia court. The Lynchburg charter only authorized the purchase of property necessary for city purposes. The charter before us authorizes the purchase of property

necessary or convenient for such purposes. The authorities cited by the Virginia court, in the main, bear on the question of exercising governmental powers outside the city. Those that touch on mere rights of ownership, support a view rather contrary to the decision of the court. For example, *Riley v. Rochester*, 9 N. Y. 64, is referred to. The learned counsel here rely upon that and similar cases. The New York court expressly declined to hold that a city cannot take title to realty outside its limits for any purpose. It held that it cannot do so for the purpose of exercising governmental authority over the same. *Coldwater v. Tucker*, 36 Mich. 474, was cited by the Virginia court and is also relied upon here. That holds that a city may own public works outside its boundaries by implied authority under some circumstances.

The rule that a city cannot exercise its governmental authority outside its limits has nothing to do with the case in hand. This court held that it cannot exercise such authority in *Becker v. La Crosse*, 99 Wis. 414, 75 N. W. 84. It at the same time recognized that a city may exercise its mere right to own and use property for legitimate city purposes outside its boundaries. That is very decisively maintained in the following cases, which seem to fully cover the case in hand, so far as decisions in another jurisdiction can do so: *People ex rel. Murphy v. Kelly*, 76 N. Y. 475; *Matter of Application of Mayor, etc.*, 99 N. Y. 569, 2 N. E. 642; *Lester v. Jackson*, 69 Miss. 887, 11 South. 114. In the second case cited Judge Dillon appeared for the city of New York and prevailed in the contention that the city possessed power to purchase land outside the city for a park. It was suggested to the court by the opposition, as an indication of the absurdity of that doctrine, that if land outside a city can be held for a park, it can acquire property regardless of distance; that if the city of New York can purchase land three miles from its limits, it can go to the Falls of Niagara or to the Adirondack Mountains, and can also build and operate a railroad to the premises acquired, and when its right in the matter is challenged, defend upon the plea of city purpose and implied power to subserve the same. That argument was taken seriously by the court and considered, with the result, based upon reason and authority, that a general grant of power as regards those matters which do not involve governmental functions, cannot be fenced about by corporate limits; that what constitutes a city purpose within such limits does not change merely by passing beyond the same. This language was used:

"The truth is that neither in authority, nor in the legislative practice, nor in the common sense of the question is there any basis for declaring that there can be no true and sound municipal purpose which reaches beyond the corporate lines."

The undoubted right to purchase a water supply outside the city was suggested, and the instance was pointed to of New York going for such purpose to a distance of forty miles from the city and expending millions

of dollars in that regard. After disposing of the primary question of whether all city purposes end at the corporate limits going outward, and commence at such limits coming inward, the court took up the idea of distance suggested by the illustration given by counsel, and held that power in that regard is limited by the very nature of it; that so long as, considering the end in view, the range of reasonable convenience and adaption to the exercise of the express power is not overstepped, municipal authority is not exceeded; that when an extreme action shall have been taken, so as to impress the impartial mind of some ulterior purpose, it is time to pause if not to turn backward. That doctrine was indorsed in *Lester v. City of Jackson*, *supra*, which was another case of buying land beyond the city limits for a park. The language of the court, in substance, was this: A municipal corporation may take and hold land convenient and accessible for a park, although it lies outside the corporate limits, and the charter confers no express authority to own land outside; the city cannot exercise its sovereignty over it, but it can exercise all the rights and powers pertaining to ownership.

It would not be profitable to examine at length the numerous cases called to our attention by appellant's counsel to support his view. It seems sufficient to say that, in the main, they hold that municipal authority in a governmental sense cannot be exercised outside the limits of the municipality. That is in harmony with the decision of this court, as we have seen. It is also in harmony with the view that municipal ownership may reach beyond corporate limits, as held in the cases to which we have referred. When one draws the distinction between mere right to own property for city purposes and the right to exercise sovereign authority over property, the authorities upon which this case was grounded are easily seen not to warrant the result sought.

In testing the question of whether a municipality has exceeded its corporate authority in going outside its boundaries in any given case, we must first determine the purpose in view. If that be found to be the exercise of police authority, or authority to govern in any sense, the conclusion must be that the end does not justify the act. If it be found to be the mere exercise of a business function, the conclusion must be that the mere act of going beyond the boundary does not necessarily involve excess of power. In determining whether corporate authority has been exceeded by reason of distance from the city limits the act in question reaches, we must solve that by an appeal to reason and common sense, keeping in mind that municipal corporations, in their business matters, are governed by very much the same rules as private corporations. *Washburn Co. v. Thompson*, 99 Wis. 585, 75 N. W. 309. It comes down in each case to the exercise of mere human judgment. That being the case, there must necessarily be a wide range within which municipal officers, acting in good faith, may go, and not be guilty of such an abuse of power as to render their acts, as acts of the city, void. As suggested in the New York case, they may go to

the point where to go further would indicate some ulterior motive,—indicate that a legitimate city purpose was no longer in view. That would be true whether the act done were performed within or without the corporate limits. Manifestly, in purchasing real estate for the convenience of a city, the element of convenience will enter into the matter, whether the purchase be made on one side or the other of the boundary line of the corporation. If the agents of the city should go so far from its boundary to obtain land for its use that the element of convenience would be no longer apparent, there would undoubtedly be such an abuse of authority as to render the act void. There is nothing of the kind in this case. It is not questioned, as we understand it, that municipal authority was not exceeded if power existed to purchase land for the purpose of obtaining a supply of crushed rock for use upon the city streets, beyond the city limits, at all. It follows, therefore, that the order appealed from must be affirmed.

By the Court.—Order affirmed.

BROOKS v. BROOKLYN. 116

1910. 146 Ia. 138.

Two actions brought by plaintiff, one to annul a contract entered into between defendant town and J. J. and Henrietta Watkins for the purchase of a lot whereon to erect a city building; to cancel the deed therefor; to compel a restitution of the funds paid for the lot; and to recover judgment therefor; and the other to annul and set aside certain contracts made by defendant town with defendants Coutts and Ormiston for the erection of an alleged city building; to enjoin the erection of the building; to have an election at which the contract for the building was approved by the electors adjudged illegal; and for other equitable relief. The trial court dismissed both petitions, and plaintiff appeals. The cases were tried together in the lower court and are submitted here as one. First case affirmed. Second reversed and remanded.

DEEMER, C. J. There is little dispute in the facts, the questions presented, aside from one to be hereafter noted, being of law. The town of Brooklyn is duly incorporated and has a population of about one thousand two hundred. Like most Iowa towns it is a farming community, and aside from its social and mercantile affairs its interests are largely agricultural. Prior to the transactions to which we are about to refer, it had no city hall, no fire station, no theater, no opera house, and no large public assembly hall. Some of its public-spirited citizens conceived the notion that all these things might be joined in one building, and that a lot could be purchased and such a structure erected

through a tax levy upon all the property within the town. This proposition was submitted to the town council, and the plan met with the approval of the members thereof. Steps were almost immediately taken to accomplish the wishes of the authors of the plan, and on July 3, 1908, the town council submitted to the electors at a special election the following proposition: "Shall the town of Brooklyn, Iowa, build a new town hall and assembly hall, at an expense of not to exceed \$8,000 in addition to what may be realized from the old building?" By a vote of about two to one, this proposition was carried. Almost immediately thereafter the council began negotiations for a lot and also authorized the employment of an architect to design plans for the building. Before anything was done, however, and on September 4, 1908, the city, in levying the improvement taxes, levied a three-mill tax for a town hall sinking fund, which, as we understand, was duly certified to the proper authorities. On October 6th the council made a conditional contract with the defendants, Watkins, for the purchase of the lot in question, the contract to be void if both it and the proposition to erect a town building were not approved by the electors. However, on December 4th, the contract was resigned and reaffirmed without conditions, and the council directed the immediate consummation of the contract and the payment of the consideration out of the general funds of the town. Without a vote of the electors, save as heretofore indicated, the purchase price, to wit, \$1,160, was paid out of the general funds and deed made to the city. On the 4th of December the city adopted the plans for the new building, and contracts were immediately entered into with defendants Coutts & Ormiston for the erection of a building according to these plans. At a special election held on January 11, 1909, the contracts so entered into were submitted to the electors; the proposition being as follows:

Notice to Voters: For an affirmative vote on any question submitted on the ballot make a cross (X) mark in the square after the word "Yes." For a negative vote make a similar mark in the square following the word "No."

Shall the following public measure be adopted, to wit:

Yes	
No	

Shall the contracts approved by the town council in relation to the erection of a town hall be adopted, as follows: [Here is set out the contract with R. G. Coutts, and immediately thereunder the contract with I. J. Ormiston.]

The contract with Coutts was for the erection of the building, and with Ormiston for the plumbing, heating, and lighting of the structure. But one proposition was submitted — that is to say, the electors had to approve both or neither. The vote of the electors was in the affirmative. This action to set aside the various deeds, contracts, etc., was commenced originally on December 24, 1908, and on February 15, 1909, plaintiff filed an amendment to the petition challenging the validity of the January election. The nature of the attack upon

the proceedings is so well stated in appellant's brief that we here quote from it as follows:

"The plaintiff, appellant herein, by these actions, seeks to have the purchase of said lot set aside, on the ground that the same is illegal and void, because the proposition therefor was not submitted to the voters for their approval; and he asks that the defendant be restrained from erecting the proposed building, because it is not such a building as the town has the power to erect, it not being designated or planned for municipal use; and he further asks that said election be set aside and held invalid, for the reason that the same was held to vote upon illegal propositions, and further, that the voters were not given an opportunity to vote for or against each of the contracts submitted, but were compelled to vote either for the adoption or against the adoption of both."

As to the building itself, we quote the following from appellant's brief:

"The building as thus planned and approved is ninety feet in length and forty feet in width. It has a floor space, excluding boiler rooms, of almost six thousand square feet. Of this space, but one thousand two hundred square feet is to be used by the city government for offices, fire department, etc., leaving quite four thousand square feet of floor space for use for other purposes. The plans, as a whole, show that the building is designed for an opera house, it being provided with an auditorium capable of seating four hundred or five hundred people, a box office, ticket window, stage, balcony, dressing rooms, etc. The dressing rooms are marked "store rooms" on the plans, and have a floor space of about one thousand square feet, and are additional to the so-called fire department and apparatus rooms. The plans show that these "store rooms" are to be "finished" — quite an unnecessary expense if they are to be used solely for storage purposes."

Blue prints, showing basement, first and second story plans, cross-sections, elevations, roof plans, etc., are in evidence and have been certified as a part of the record.

It is well settled, of course, that a municipal corporation has such powers and such only as are, first, expressly granted, or second, such as are fairly or necessarily implied from those granted, or third, such as are essential to the declared objects and purposes of the incorporation. As to the third, it is not enough that they be convenient; it must appear that they are indispensable. In case of doubt the existence of power is denied by the courts. *Clark v. Des Moines*, 19 Iowa, 199; *Logan v. Pyne*, 43 Iowa, 524; *Becker v. Water Works*, 79 Iowa, 419; *Brockman v. Creston*, 79 Iowa, 587; *Heins v. Lincoln*, 102 Iowa, 69; *Cherokee v. Perkins*, 118 Iowa, 405. If there be no authority to make a contract under these rules, any attempt to do so is void. *McPherson v. Foster*, 43 Iowa, 48; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 284; *Weitz v. Ind. Dist.*, 79 Iowa, 423.

Again, if the project is merely colorable under the pretense of some

actual authority, but intended to promote some private or unauthorized purpose, courts will declare it illegal. *Strahan v. Malvern*, 79 Iowa, 454; *In re Attorney-General v. Eau Claire*, 37 Wis. 490; *In re City v. McNab*, 67 Ala. 588 (42 Am. Rep. 118); *Coates v. Campbell*, 37 Minn. 498 (35 N. W. 366); *Allen v. Jay*, 60 Me. 124 (11 Am. Rep. 185); *Mather v. City of Ottawa*, 114 Ill. 659 (3 N. E. 216); *Nerlien v. Brooten*, 94 Minn. 361 (102 N. W. 867); *Sugar v. Monroe*, 108 La. 677 (32 South. 961, 59 L. R. A. 723); *Dorton v. Hearn*, 67 Mo. 301.

The rule with reference to public building has thus been stated:

The validity of appropriations for the purpose of erecting or repairing public buildings is sometimes contested in the courts on the ground that the contemplated accommodations exceed the actual needs of the corporation, and are to be rented in part to private individuals. The distinction drawn in the authorities is this: If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal notwithstanding it also involves as an incident an expense which, standing alone, would not be lawful. But if the primary object is to promote some private end, the expenditure is illegal even though it may incidentally serve some public purpose. It is proper in constructing buildings to make suitable provision for prospective wants. Proceedings in raising and expending money within the limits of the corporate powers in these particulars will not be collaterally impeached and held void because in the opinion of a court and jury a less sum would have answered the immediate necessities of the corporation or the money might have been more judiciously and economically expended. Beach on Public Corporations, vol. 1, section 646.

In *Worden v. New Bedford*, 131 Mass. 24 (41 Am. Rep. 185), it is said: "The city could not erect buildings for business or speculative purposes, but having a city hall, built in good faith and used for municipal purposes, it has the right to allow it to be used incidentally for other purposes, either gratuitously or for compensation. Such a use is within its legal authority, and is common in most of our cities and towns. *French v. Quincy*, 3 Allen, 9."

In *Bates v. Bassett*, 60 Vt. 535 (15 Atl. 202, 1 L. R. A. 166), it is said:

"The fitting up of rooms for rent was an expense incidental to the building of the town hall. The town has no right as a primary purpose to erect buildings to rent; but if in the erection of its hall for its proper municipal uses it conceives that it will lighten its burdens to rent part of its building, whereby an income is gained, no sound reason is suggested why it may not do so. The true distinction drawn in the authorities is this: If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense, which, standing alone, would not be lawful. But if the primary object is not to subserve a public municipal purpose, but to promote some private

Gen. rule
Public Bldgs

end, the expenditure is illegal, even though it may incidentally serve some public purpose. This is the test where good faith is exercised in making the expenditure. If a public purpose is set up as a mere pretext to conceal a private purpose, of course the expenditure is illegal and fraudulent. There is nothing in this case that invalidates the action of the town in building its new town hall. *Spaulding v. Lowell*, 23 Pick. [Mass.] 71. Having elected to build, the town had on its hands an old building. In the exercise of what seemed to them to be a wise discretion, the voters decided to repair it for rental purposes. This is said to be illegal. It would be if the primary object was to invest money in a building to rent. The town could not purchase a building for rental purposes solely. But here the town absolutely owns a building purchased or erected for its proper municipal purposes. It no longer has use for it for municipal purposes. Must it sacrifice its property, or may it not do with it what a prudent man would do with a building? . . . It is no answer to say that the town would in the long run be as well off to give away its old building. The question was one for the town to decide for itself, and its decision made in good faith is final."

In that case, in repairing an old town building, the town fitted up and rented a part of the old structure for an opera house.

Kingman v. City, 153 Mass. 255 (26 N. E. 998, 11 L. R. A. 123), decides that it is not competent for a city to appropriate public money for the erection of a building to be used in part by a certain Grand Army post during its existence as an organization, since that is not a public purpose. During the course of the opinion the court said:

"It is said that if a city has a public building already erected, which is larger than its present needs for municipal purposes require, it may allow portions of such building to be used for other purposes for the time being, either for a stipulated rent or price, or gratuitously; and, further, that in erecting a public building a city need not limit the size of it to actual existing needs, but may make a reasonable provision for probable future wants. All this, within proper limits, is true. *Worden v. New Bedford*, 131 Mass. 23 (41 Am. Rep. 185); *French v. Quincy*, 3 Allen, 9; *Spaulding v. Lowell*, 23 Pick. 71. But there may be some danger of extending this doctrine too far. Should a question arise whether a contemplated building exceeded what was allowable with reference to legitimate prospective needs, such a question would have to be determined on its own merits; and the good faith of the transaction and the soundness of the judgment shown in providing for future wants might have to be considered. No such question has arisen heretofore, or arises now. In the present case it is proposed to erect a building with the express purpose of devoting a portion of it to the use of the G. A. R. post, not temporarily, but as long as that organization may exist. . . . Without now considering whether in any respect this statute goes too far or is liable to abuse, it is sufficient to say that it refers only to existing public buildings, and by no means

authorizes the erection of a building to be let to a Grand Army post at a nominal rent. In addition to *Mead v. Acton*, 139 Mass. 341 (1 N. E. 413), and cases there cited, the following, among others, may also be referred to as tending to support the views above expressed, in respect to the proper limits of the right of taxation. *Jenkins v. Andover*, 103 Mass. 94."

In *White v. Town of Stamford*, 37 Conn. 586, it is said:

"We do not doubt the power of towns to build town halls for their public meetings, and, if the building is solely for the purposes of a hall, the town within reasonable limits must judge for itself of the size and style of the structure. But it is obvious that the building complained of is not a mere town hall. It indeed contains a hall in its third story, but the other stories are to a considerable extent to be rented, in the expectation no doubt that the rents will ultimately pay wholly or in part the expenses of the entire structure. Something of the same kind on a small scale has sometimes been done without objection in the towns and cities of the State. It is sometimes incidental to a public building that portions of it are not needed for public purposes, and these are fitted up and rented, and the rents applied toward paying the expenses of the building. But in the present instance the rents are more than incidental. The enterprise evidently involves extensive arrangements for renting, and the selectmen of the town, or a committee for managing the premises, will have the control of important interests which seem to be rather private than public in their character and nature. A town is a public corporation, not adapted to carry on trade and rent property. Its citizens are members of the corporation not by choice, but by compulsion of law, and ought not to be forced into a partnership in carrying on business for gain. The impolicy of entrusting to town agents the management of private business is very obvious; and we think the Legislature has not by any general law conferred authority upon towns to erect buildings for rent, and also are of opinion that the resolution of 1868 cannot be construed as giving authority to the town to erect such a structure as is being built."

These authorities seem to announce the law, as it is generally applied, in this country.

Going now to the exact questions presented, it will be observed that, while plaintiff concedes that the town had power to buy the lots, it could not pay for the same out of the general funds of the city, and could not buy without submitting the contracts to the electors as provided in sections 741j-741m of the Code Supplement of 1907, being a reprint of chapter 28 of the Acts of the Thirtieth General Assembly. The council evidently began its efforts to procure the lots and build the building under this law; but it afterwards abandoned the same and purchased the property and paid for it out of the general funds. Aside from this statute, the town had power to acquire and hold real and personal property. Code, section 695. To purchase the necessary

ground and construct buildings for a fire department and fire company. Code, section 716. To erect a city jail. Code, section 735. To purchase and pay for out of the general funds any lands for the various purposes, naming them, and including the purposes above named, and in all other cases where such purchase is or may hereafter be authorized. Code, section 880. Here is express authority to purchase real estate for the purpose of erecting a building for the fire department or fire company and to pay for the same out of the general funds. Chapter 28 of the Acts of the Thirtieth General Assembly does not repeal these sections, unless by implication, and as such repeals are not favored, we must hold that the latter Act of the Legislature has reference to cases where the town has not in its general funds enough to pay for the grounds and is compelled to issue its bonds or warrants therefor to be paid at a future date. A sinking fund tax is a tax raised to be applied to the payment of the principal and interest of a public loan or obligation. *Union Pacific R. R. v. York Co.*, 10 Neb. 612 (7 N. W. 270); *Bank v. Grace*, 102 N. Y. 813 (7 N. E. 162); *Brooke v. City*, 162 Pa. 123 (29 Atl. 387, 24 L. R. A. 781). This construction harmonizes the entire law and was manifestly the one intended by the Legislature. It also finds support in *In re Cedar Rapids*, 85 Iowa, 39; *Diver v. Savings Bank*, 126 Iowa. 691. Enter-
taining no doubt of the power of the town to purchase and pay for the
lot in question out of its general fund, the decree in the first case must
be affirmed.

II. The second case presents two questions: The first being the sufficiency of the ballot; and the second, the nature of the building which the town proposed to erect. Two contracts were presented to the voters for approval; but the elector, by the form of ballot used, had to vote for or against both contracts. He could not vote for one and against the other, save as he by reason of his objection to one should vote against both. Did this invalidate the election? Because
but one object was sought, viz, the building of a town hall, the ques-
tion under the rule announced in *Rock v. Rhinehart*, 88 Iowa, 37,
must be answered in the negative. If the voter did not wish to have the town hall erected, he would vote in the negative. If he thought that one of the contracts was bad he would also vote no and as said in *Rock's* case, "A careful reading of the ballot under consideration, in the light of facts connected with the election, shows marked distinction between this and the cases cited. There is but one object — the erection of a courthouse — while in those cases there were two or more. Following *Gray v. Mount*, *supra* [45 Iowa, 591], we must say that, there being but one object, there was but one proposition."

Moreover, section 741m of the Code Supplement of 1907 gives the form of the ballot as follows: "Proposition to be submitted at said election and the form of ballot shall be: Shall the contract or contracts approved by the city or town council in relation to the purchase of buildings or grounds or erection of buildings be adopted? The

2. Form of
 ballot suff.

proposition shall be printed and placed on the ballots and the voter shall designate his choice and the election shall be conducted in the manner provided in the chapter on elections." Code Supp. 1907, section 741m. Having followed the language of the statute the ballot should be approved.

in answer to

We are abidingly satisfied that the building, as planned, is not such an one as the town had authority to build. It is in fact an opera house with all the necessary equipment for such a building. The town offices and the place for the fire department were mere incidents to the building. However desirable it may be for rural towns to have a large assembly hall or opera house, it is not within the power of the town council to build it. The officials are not ordinarily selected to manage theaters or opera houses, and in view of the fact that when so managed the town becomes responsible for their care and safety, and is liable to any one injured by or through the neglect of any of the officials or employees of the city, it is a burden which should not be assumed. There was no need for such a building for municipal purposes, and it is but a thin disguise to cover a purpose not authorized by law. The burdens of taxation are heavy enough without entering upon any such hazardous enterprises as are here proposed. Our form of city government is representative in character and is in no sense like the New England town meeting. Where that system of government obtains a large assembly hall is no doubt necessary; but there is no occasion for one where our elections are by ballot. The room provided in this building was large enough for a county courthouse, and we find nothing in the statutes which will justify such a building. Moreover, we are satisfied that the real intent was to avoid the statutes to which we have referred, and it is our duty to prevent any such evasions.

It follows that the relief asked in the second case should have been granted. The decree in that case will therefore be reversed, and the cause remanded for a decree in harmony with this opinion. Each party will pay one-half the costs of the appeal.

First case *affirmed* and second case *reversed* and *remanded*.¹

STATE EX REL. JOHNSON v. BROWN. 117

1910. 111 Minn. 80.

JAGGARD, J. The only question in the case is whether or not the board of park commissioners of the city of Minneapolis has the power to erect upon park property a dwelling house, which is to be used by the park superintendent and his family as a residence, and as an office by the park superintendent and his associates. The relevant provision

¹ See *Denver v. Hallett*, 34 Col. 398.

of the city charter is section 2 of the park board act approved March 11, 1909. It is as follows:

"The board of park commissioners of the city of Minneapolis and its successors shall have the power, and it shall be its duty, to devise, adopt and maintain parks and parkways in and adjacent to the city of Minneapolis, and from time to time to add thereto; to designate lands and grounds to be used and appropriated for such purposes; to cause the same to be platted, surveyed, and plats thereof filed in the office of the secretary of said board, and in the office of the city engineer of the city of Minneapolis, and the right to take possession, upon obtaining title to the same or any part thereof; *to hold, improve, govern and administer* the same for such purposes." (The italics are ours.)

It is to be noted that this is a statement of general powers, and not an enumeration of particular powers, which would naturally exclude others not set forth. The board, therefore, had these general powers and such powers as would be reasonably implied therefrom. It is evident that on an extremely liberal construction of these powers the erection of the proposed building would be unquestionably justified. On an extremely strict and literal construction it may not be impossible that such erection would not have been authorized. But on a reasonably strict construction we think that the park board had the power to contract for the erection of such a building, and that the city comptroller of the city of Minneapolis should have countersigned the contract as provided by chapter 374, Laws 1909 (R. L. Supp. 1909, §§ 765—29 to 765—81).

It is clearly within the implied powers of the park board to erect on its property pavilions, boathouses, workshops, stables, greenhouses, storehouses, an administrative building, and the like. It is within the discretion of the board whether it should combine with the administrative building a superintendent's residence. Usually parks are situated at some distance from the city. It may, then, be necessary to provide the superintendent with a residence within the limits of the park. Even if such a residence be not absolutely necessary under the circumstances here presented, it is very reasonable that he should be on the ground, where he can see to it that park property is properly used for park purposes. His residence there would naturally conduce to conserve the improvements on the premises, to the proper government of the park, and to the proper administration of the trust. As a result there would constantly be some one in authority always accessible, and all matters properly related to disciplinary and administrative affairs could be attended to as promptly as possible. The proposed building may fairly have been regarded as practically necessary.

It is, however, urged upon us that a city engineer, or an engineer of city sewers, supervises and controls a much larger mileage of streets than the park board of parkways, and that these departments are compelled to keep track of as many or more tools. Why, it is naturally asked, should not the city provide a residence for such an officer, or

Power

for the chief of police? This question is not before us, and it would be entirely improper to undertake to here decide what the city might not legally do under such circumstances. The functions and the jurisdictions of the various officers are so obviously different that the reasoning on their respective powers has not much cogency. But if a county can properly provide a residence for a sheriff, why not a city for its chief of police? It is common in all charitable and penal institutions for the superintendent to reside on the premises. It is true that in many cases special statutory or charter provisions justify the furnishing of such residences. Often, however, the provision is substantially the same as the provision at bar. The fact is significant, however, and indicative of a true public policy.

The question is one of reasonable discretion on the part of the park board. Its conclusions must be sustained, unless they appear to be arbitrary, or the result of fraud or demonstrable mistake of fact. See *Diamond v. City of Mankato*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448; *Le Feber v. West Allis*, 119 Wis. 608, 613, 97 N. W. 203, 100 Am. St. 917; *State v. State Medical Examining Board*, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; *State v. Powers*, 69 Minn. 429, 72 N. W. 705; *State v. Teal*, 72 Minn. 37, 74 N. W. 1024; *State v. Copeland*, 74 Minn. 371, 77 N. W. 231. We find nothing to disturb this conclusion in the cases to which respondent refers us. *Borough of Henderson v. County of Sibley*, 28 Minn. 519, 11 N. W. 91; *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166; *Spaulding v. City*, 23 Pick. 71, 80; *Sherlock v. Village*, 68 Ill. 530.

Reversed.

BROWN, J. (dissenting).

I dissent. Whether the cities and villages of the state should be clothed with the power and authority to construct dwelling houses for their officers and servants at the expense of the taxpayer is a question for the legislature to determine, and in language too clear to admit of doubt, and not by the court through a forced construction of their express charter powers. In this case it is not claimed that any such authority has ever been expressly conferred upon the city of Minneapolis, but my brethren do insist that it arises by implication and as an incident to the express power to purchase, hold, and manage public parks, under which it is held that a dwelling for the use and occupancy by the superintendent of parks may be constructed at public expense. I am unable to concur in the proposition that such power exists by implication.

Charter powers of municipal corporations are strictly construed, and the rule of strict construction is no better illustrated than by our own decisions. *State v. Bruckhauser*, 26 Minn. 301, 3 N. W. 695; *State v. Hammond*, 40 Minn. 43, 41 N. W. 243; *City of St. Paul v. Stoltz*, 33 Minn. 233, 22 N. W. 634; *City of Red Wing v. Chicago, M. & St. P. Ry. Co.*, 72 Minn. 240, 75 N. W. 223, 71 Am. St. 482. The implied powers of a municipal corporation are those, and those only, which are

necessary, not merely convenient or proper, to enable the corporation to exercise either its inherent or express powers. The whole law on this subject is correctly summed up by Chief Justice Baldwin in the case of *Crofut v. City*, 65 Conn. 294, 32 Atl. 365, as follows:

"The powers expressly granted to a municipal corporation carry with them such other powers as are necessarily implied in or incidental to such grants. And it also possesses all powers which are indispensable to the attainment and maintenance of its disclosed objects and purposes. Municipal corporations are more strictly limited in these respects than private corporations. *The test of their right by implication to exercise any particular power is the necessity of such power, not its convenience. If there be reasonable doubt as to its existence it does not exist.*" See also *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac. 682; 28 Cyc. 262.

In my judgment the construction of a private dwelling for the superintendent thereof is not necessary to the exercise of the power to own, hold, and manage a public park.

I therefore respectfully dissent.

DETROIT v. DETROIT CITIZENS' STREET RAILWAY. 118

1902. 184 U. S. 368.

THE bill in this suit was filed by the railway company for the purpose of obtaining an injunction to restrain the city of Detroit and the individual defendants from enforcing certain ordinances of the common council of the city, adopted in 1899, reducing the rates of fare on the various city railways of the complainant and providing for transfers of passengers from one route to another on payment of one fare of five cents, on the ground that such ordinances were violations of the Federal Constitution, because they impaired the obligation of contracts theretofore entered into between the city and the various predecessors of the complainant. The Circuit Court granted a decree perpetually enjoining the defendants as prayed for, and they have appealed therefrom to this court.¹

PECKHAM, J. . . . In furtherance of the claim by defendants that the ordinances of 1899 reducing the rates of fare are valid, it is urged that express authority from the legislature is required to enable the common council of a city to pass ordinances such as those described in this case, providing for the consent of the city to the laying of tracks and the running and operation of a railroad through its streets and the fixing of rates of fare, and that no such power was granted in this case, and if there were, there has been no agreement made by the passage of

¹ Statement of facts omitted. Part of opinion only given. — ED.

the ordinances referred to in the statement of facts. It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question, including rates of fare. But there can be no question in this court as to the competency of a state legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to the rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such contract. *New Orleans Gas Company v. Louisiana Light Company*, 115 U. S. 650; *New Orleans Waterworks Company v. Rivers*, 115 U. S. 674; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64; *Walla Walla City v. Walla Walla Water Company*, 172 U. S. 1, 9; *Los Angeles v. Los Angeles City Water Company*, 177 U. S. 558, 570; *Freeport Water Company v. Freeport City*, 180 U. S. 587, 593. The contract once having been made, the power of the city over the subject, so far as altering the rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract.

HATFIELD v. STRAUS.

1907. 189 N. Y. 208.

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O'BRIEN, J.¹ The plaintiffs in this action as property owners seek to restrain the defendants from carrying into effect a resolution of the board of estimate and apportionment of the city of New York which authorizes or purports to authorize certain of the defendants to lay down and construct a spur railroad track in front of their premises.

The plaintiffs are residents and property owners in the city of New York. They own and occupy the house and lot at No. 149 West Thirty-fourth street as a private residence, having resided there for many years. The defendants Isidor and Nathan Straus compose the firm of R. H. Macy & Company, and that firm occupies, as lessees, the premises on the northwest corner of Sixth avenue and Thirty-fourth street, eastward of and immediately adjoining the plaintiffs' property, as a large department store. The other defendants are the city of New York and certain of its municipal officers having control of the streets, or whose official action in some form is necessary in order to carry out the purposes of the resolution. The immediate purpose of the action was to restrain the defendants from obstructing the street near the plaintiffs' residence by carrying into effect the permit, consent or ordinance of the board of estimate and apportionment, which, it is claimed, permitted the proprietors of the department store to lay down railroad tracks and operate express cars thereupon for the conveyance of goods

¹ Argument and part of each opinion omitted — Ed.

to their store from the street railroad in Thirty-fourth street. The only relief demanded in the complaint was a perpetual injunction.

The fundamental and important question in the case is with respect to the validity of the ordinance expressing the consent of the city, through its municipal authorities, for the use of the street in the manner described and specified therein. There can be no doubt that the board of estimate and apportionment possessed all the powers concerning the use of the streets by the public and by private parties that were formerly possessed by the board of aldermen. *Wilcox v. McClellan*, 185 N. Y. 9, 17. There can be no doubt that municipal authorities having the care and control of the streets in a city may authorize their temporary use by private parties for private purposes to a limited extent. The precise limits beyond which that power cannot be exercised have not been very specifically or accurately defined and perhaps cannot be. The governing body in a city may permit private parties to deposit building materials in the streets, to construct and use coal holes, cellarways, areas, vaults under the sidewalks, awnings above and the like. But all these and all similar uses of the public streets for private use are either expressly authorized by statute or sanctioned by the courts as being exceptions to the general rule, borne of necessity and justified by public convenience and custom. The right to such use is given to the general public and enjoyed by all citizens alike. In the present case the privilege has been granted to private parties and is special and peculiar. *Callanan v. Gilman*, 107 N. Y. 360; *Hoey v. Gilroy*, 129 N. Y. 132; *Jorgensen v. Squires*, 144 N. Y. 280.

These cases, however, affect only in a very slight way the general rule that the primary purpose of streets and highways is the use of the public for traveling and transportation, and that any encroachment thereupon which interferes with such use is a public nuisance. There can be no doubt that an abutting owner in a city has the right of free access to and from his property in the usual way. He may use for that purpose such means of conveyance for the transportation and delivery of goods and merchandise as are usual and customary, but the right of ingress and egress with railroad cars running upon railroad tracks has not yet, I think, been sanctioned by custom or by law. The claim of a right in that regard is far in advance of any use of the public streets that has heretofore been recognized. It may be argued that if the abutting owner may use carriages, wagons, trucks and even motor cars for the purpose of free access and the transaction of his business, why not permit him to use railroad cars upon a railroad track? Such an argument is misleading, since if carried to its logical conclusion the result would be that the governing body in a city would have the power to surrender the use of the streets to private parties for exclusively private purposes. The courts must draw the line at some point beyond which private interest and convenience must yield to the general public good. The general current of authorities on the question concerning

Some unusual

business

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the use of public streets in cities indicates quite clearly that the line has been extended and the domain of discretionary power very much expanded by the ordinance adopted in this case. If we are prepared to hold that the defendants are empowered to adopt and carry out the resolution in question, then, as was suggested in the learned opinion of the court below, the same claim of right must be sanctioned when like privileges are granted to all merchants in the city who are similarly situated. In this view the result of our decision in this case must be important and far-reaching to the whole community. We are not concerned with the question whether the exercise of the power embodied in the resolution was necessary or reasonable. The defendants do not attempt to justify the grant upon any such ground, and these considerations are not pertinent to the questions certified to us by the learned court below, and which confer upon this court the only jurisdiction it has over the case.

Keeping in view the fact that the questions certified to this court call simply for the construction of a specified section of the city charter, it is not necessary to call attention to the numerous authorities in this State that deal with the general question, concerning the power of the city authorities having control of the streets, to authorize obstructions to be placed therein for the benefit or convenience of private parties. It is quite sufficient to observe that the authorities already cited in support of the right of the plaintiffs to maintain this action also deal with the question of power in the local government to authorize interference with a street by individuals or corporations for their own use and benefit. The general question as to the power of local authorities to permit such obstructions has been dealt with and discussed in the courts of other states in a very broad and comprehensive manner. In those cases the court was not limited, as this court is, to the mere question concerning the meaning and construction of a section of the city charter or other statute. On the contrary, the discussions in these courts took a very wide range, and the results announced denote the general trend of judicial authority against the power of municipal authorities to permit obstructions of the character involved in this case to be placed in the public streets of cities. *Glaessner v. Anheuser Busch B. Assn.*, 100 Mo. 508; *Gustafson v. Hamm*, 56 Minn. 384; *Heath v. Des Moines & S. L. Ry. Co.*, 61 Ia. 11; *State v. Trenton*, 36 N. J. Law, 79; *Mikesell v. Durkee*, 34 Kan. 509; *Mayor v. Harris*, 73 Ga. 428.

A single extract from one of these cases will sufficiently disclose the views of the court in all of them: "Everything which is fairly within the idea of regulating streets, with a view to their use as streets, may be done by corporate legislation." In measuring the extent of the power, the object and purpose for which it was given must always be regarded as the test. Is one of those objects or purposes subserved by permitting one individual to enjoy a use of the highway which is denied to all others? I think not. If such power is conceded, its exercise is limited only by the discretion of the common council, who must

be the sole judges of the extent to which obstructions may be placed in the streets. If they can license one to build a railroad across the highway for his own exclusive benefit, of which the public can have no user or advantage of convenience, it is difficult to perceive why they cannot empower another to place therein a structure which would more effectually impede the public passage and maintain it there during their pleasure. How considerable must the obstruction to the way become, before the judgment of the common council can be controverted, and the judicial arm interpose? A grant to every one on the street of a like nature with that now resisted would render the highway well nigh impassable. The right to license one necessarily implies authority to license all, and thus municipal corporations under the general power to regulate streets become the source from which franchises to favored individuals in the public ways derive their existence. Streets and highways are intended for the common and equal use of all citizens, to which end they must be regulated. An appropriation of them to private individual use from which the public derive no convenience, benefit or accommodation is not a regulation but a perversion of them from their lawful purposes and cannot be regarded as an execution of the trust imposed in the city authorities. . . . The power of the common council to permit owners of stores or other buildings to erect awnings over streets, or to leave boxes on the sidewalks, under certain regulations rest upon a different principle and has been sanctioned by usage as the exercise of a right in the owner of the fee, not inconsistent with the public right of passage. *State v. Trenton, supra.*

The order appealed from should be affirmed, with costs, and the first question answered in the negative and the second question answered in the affirmative.

CHASE, J. (dissenting) . . . The general rule that streets and highways are solely for passage by the public is subject to some exceptions born of necessity and public convenience. The primary purpose of streets and highways is for use. If a physical or other barrier should be erected on all lot lines adjoining streets and highways, such streets and highways would become wholly useless. There is no prohibition against an owner of lands abutting a highway from passing to and from the same. Such right of passage is not confined to the owner of the abutting lands, but extends to all persons lawfully desiring to pass to and from such abutting lands and also to the transportation of all goods, wares and merchandise in any way lawfully used in connection therewith. An owner of a building abutting on a street may not only freely pass to and from the same but incident to his ownership he may use the street and sidewalk in front of his property as a place to load and unload his goods and for all usual and necessary purposes of his business although it may occasion a temporary obstruction, provided he does not interfere unreasonably with the public right. *Jorgensen v. Squires*, 144 N. Y. 280; *Welsh v. Wilson*, 101 N. Y. 254; *Callanan v. Gilman*, 107 N. Y. 360.

It is competent for the legislature to authorize abutting owners to

temporarily deposit building material in the streets, *Callanan v. Gilman*, *supra*; also to authorize abutting owners to build within the street lines underground vaults, *Deshong v. City of New York*, 176 N. Y. 475, area ways, *Devine v. National Wall Paper Company*, 95 App. Div. 194; *affd.*, 182 N. Y. 565, stepping stones, *Wolff v. District of Columbia*, 196 U. S. 152; *Robert v. Powell*, 168 N. Y. 411, and many other things which tend to the convenient and beneficial enjoyment of abutting property. *Jorgensen v. Squires*, *supra*.

In the *Robert v. Powell* case this court say: "There are some objects which may be placed in or exist in a public street such as water hydrants, hitching posts, telegraph poles, awning posts or stepping stones such as the one described in this case, which cannot be held to constitute a nuisance. They are in some respects incidental to the proper use of the street as a public highway. The hitching post for instance, in front of a private residence is intended not only for the convenience of the private individual but for the safety of the public as well, since it is intended to guard against accidents resulting from runaway teams or horses. It is quite conceivable that a shade tree located within the boundaries of the street or highway may cause an accident or injury to a private individual using the street. But it does not follow that it constitutes a public nuisance in the highway. . . . While it is said that these cases involved only the question of liability on the part of a municipality for negligence, they also decided that the existence of objects of this character in the streets is lawful."

This court in *Jorgensen v. Squires*, *supra*, say: "While such uses may restrict somewhat the free and unembarrassed use of the streets for pedestrians, the general interests are subserved by making available to the greatest extent valuable property, increasing business facilities, giving encouragement to improvements and adding to taxable values."

In the use of streets, sidewalks are built for pedestrians and spur walks are commonly constructed therefrom to residences and other property. Spur roads are run across sidewalks to stables and business property. If the express car to be used in transporting the defendants' goods, wares and merchandise should be constructed with sufficient power as a motor car, I assume there would be no question as to the legal right of the defendants to run the car over the sidewalk on their driveway into their department store as trucks with teams are now driven therein.

For the purpose of confining abutting owners to a reasonable use of the public streets it is no more necessary to require that express cars be loaded and unloaded in the streets and the highways than it is that individual consumers of gas or water be required to take the same in some way from the distributing pipes in the public streets. A reasonable use of all public service corporations would seem to require that abutting owners of property be allowed to make such reasonable con-

nection with the public service pipes, conduits or tracks as will tend to public utility. The defendants' goods, wares and merchandise must be transported from place to place, and I cannot say that running one car over a spur track from the street surface railroad would be more inconvenient to the public than running heavy motor cars or trucks drawn by horses at irregular intervals over the defendants' driveway. If such a use of the street tends to public benefit it cannot be said to be an unreasonable use thereof. No actual permanent taking of a portion of the street for private purposes is proposed. The board of estimate and apportionment in their discretion may have found that the use of such spur track within the hours mentioned would relieve a congested street and generally tend to the public good. Where the power to grant street privileges or franchises is conferred upon a municipality the exercise of the power is discretionary with the municipality and its action is not as a rule subject to control by the courts.

EDWARD T. BARTLETT, J., delivered an opinion concurring with O'BRIEN, J.; VANN and HISCOCK, JJ., also concurred. CULLEN, C. J., and HAIGHT, J., concurred with CHASE, J.

TEXARKANA GAS & ELECTRIC CO. v. TEXARKANA.

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1909. 123 S. W. Rep. 213.

HODGES, J. The appellant is a private corporation, is now and has been for many years engaged in the business of operating an electric street car system and an electric light plant in the city of Texarkana, Tex., for the purpose of furnishing to the residents of said city street car service and electric lights. In carrying on its business it has erected and uses poles and wires placed and strung in the manner usually adopted in such cases. In the early part of 1907, the city of Texarkana procured from the Legislature a special charter. Prior to that time and since 1874 it had existed as a municipality incorporated under the general laws of the state. On February 10, 1908, the city adopted an ordinance entitled, "An ordinance to regulate the placing of poles and stringing of wires thereon along, over and through the streets and alleys and other public highways of the city of Texarkana, Texas; providing for a license and a license fee upon every such pole, and providing for the collection of the same." It is then ordained, first, "That any such person, firm, corporation or association owning, operating or conducting any of the following public service, business or engagements to or with the general public or offering to do so for hire within the corporate limits of the said city or partially within and partially without the corporate limits of the said city, viz., telegraph business, telephone business, or telegraph and telephone business, or electric light or electric street railway, or either or both, or any other

Ordinance.

business where electric wires are used and suspended on poles over, along or across any of the public streets, alleys or highways, within the said city, shall be and each is hereby required to pay to the said city for the use and benefit of the street and bridge fund a license fee of fifty (50c.) cents for each and every pole that is or may be owned by any such person, firm, corporation or association and occupying any street, alley or public highway or standing and erected thereon, and upon every said pole an annual license and license fee is here levied and assessed for the year 1908 and for each succeeding year thereafter." Then follow provisions intended as regulations governing the location of the poles upon the streets and alleys, their size and position, distance and height, and other details generally imposed by cities, and which it is not necessary to mention here more fully. The second subdivision is as follows: "That each and every person, firm, corporation or association, using wires and poles in the streets, alleys or highways, as aforesaid, shall annually before the 20th day of February of each year, file with the city council a certificate which shall be duly sworn to, correctly stating the number of poles owned by him or them within the said city and it shall thereupon be the duty of the city council to charge the city tax collector with the sum of money equal to fifty (50c) cents for each and every one of said poles and a violation of this section shall subject any such person, firm, corporation or association of persons conducting any of the public utilities hereinbefore stated and so violating it to the fine of twenty-five (\$25.00) dollars and a penalty of fifteen (\$15.00) dollars for each and every day that such violation shall exist. And provided further that any failure by any person, firm, corporation or association to file said sworn statement setting forth the number of poles, or if the city council shall be doubtful of said affidavit correctly stating the number of poles, it may nevertheless have an inventory of the said poles made upon its own behalf and account and such inventories to be made by the city engineer who shall make the sworn report to the city council in writing when requested, and such report of said engineer shall be conclusive as to the facts therein recited, and the entries made upon the books of the tax collector by him and the charges against such tax collector shall be based upon the report of said city engineer when the report shall have been made by him. And each and every person, firm, corporation or association so using wires and poles as aforesaid that are now or may hereafter be placed in and along the said streets or alleys of the said city, shall pay to the city of Texarkana, Texas, to become a part of the street and bridge fund, annually, on or before the 10th day of March of each and every year, as a license and as a license fee, the sum of fifty (50c) cents for each and every pole so erected, maintained or used on said streets, alleys or highways within the said city by any such person, firm, corporation or association engaged in any of the foregoing mentioned public service and the same shall be paid to the tax collector of the said city by the 10th day of March, of each year, and upon the failure of any such person, firm,

corporation or association to make said payment annually on or before the 10th day of March, it shall be and is hereby made the duty of the city attorney to take cognizance of said failure and to proceed at once to the collection of the same and to the enforcement of this ordinance." On the 20th of February, 1908, the general manager of the appellant company, in compliance with the provisions of the foregoing ordinance requiring a report of the number of poles owned and used within the city limits, filed a written report showing that appellant at that time owned and used 787 poles within the limits of the city, in the conduct of its business. This report, however, was made under protest, and, as stated therein, for the purpose of avoiding the penalties imposed by reason of the failure to make it. The appellant refused to pay the tax of 50 cents per pole, amounting to \$391.50, which had been charged against it as a license fee under the provisions of the ordinance before mentioned, and this suit was instituted by the city to enforce its collection. As a defense the appellant alleged and proved upon the trial that some years before the granting of the special charter to the city of Texarkana, and while the latter was existing as a municipal corporation under the general laws of the state, it obtained from the city a franchise, or right, which authorized it to place and set its poles on the streets and alleys of the city, and that by virtue of that authority it had placed and set its poles on the streets and alleys, and was using and maintaining them in that position at the time the ordinance above mentioned was passed, and that the appellant was then and is now acting by virtue of the original franchise referred to. It was also shown that in the grant of the franchise claimed the terms required the appellant to furnish free of charge electric lights for use in the city hall, firehouse, and jail, and to furnish electric street lights at certain prices agreed on, and that no other license fees were therein exacted. It was further shown that the appellant has at all times complied with the terms and conditions imposed in the grant of the aforesaid franchise, and was in all things complying with the regulations made for its government in the exercise of that right. The case was tried before the court without a jury, and a judgment rendered in favor of appellee for the full sum sued for. The correctness of that judgment is assailed upon the ground that the city had no authority to levy and collect a license fee of fifty cents per pole on the poles owned and used by the appellant along the streets and alleys of the city; that having theretofore granted to appellant the right to use and occupy the streets and alleys with its poles and wires for the purposes for which they were then being used, the city had no legal right thereafter to impose an additional burden or tax upon appellant for such use.

Counsel for the city do not contend that this ordinance should be sustained as a valid exercise of the power of the city to levy and collect taxes either upon property or occupations. They do not deny that as a measure for raising revenue it would be without authority. But they justify the provisions of the ordinance objected to upon the ground

relies on
earlier franchise.

not a valid
franchise

*1. This =
Police Power*

that it is a valid and proper exercise of the police power of the city, and refer to other portions of the ordinance which prescribe regulations governing the placing and maintaining of poles and wires, designating the size and quality of the poles that shall be used, and various other details intended to prevent any unnecessary obstruction of the streets and alleys. It must be conceded that the provisions of this ordinance, including the levy of the license fee, fall within the usual police powers of a municipal corporation having the right to regulate and control the use and occupancy of its highways by persons engaged in conducting public utilities, such as that of the appellant, for private gain. But it does not follow from this that the exercise of some part of this police power may not under certain conditions be resisted upon the ground that it is an attempt to violate a vested right. The state, as the trustee for its citizens, is the ultimate holder and owner of a paramount authority to govern and regulate the use and occupancy of the public highways of the country. Municipal corporations succeed to this authority by virtue of the grants contained in their charters. 3 Abbott, Municipal Corp. § 913. When thus empowered, cities have the authority to grant to private parties the privilege of permanently occupying and using certain portions of their highways for the purpose of carrying on a business or enterprise furnishing some public service. In granting the right, or franchise as it is called, the city can impose conditions or charge a fee for the privilege given, which the applicant can accept or reject at his pleasure; but, having accepted it, he takes the franchise subject to the conditions imposed, and must pay the consideration exacted. 3 Abbott, Municipal Corp. § 908. For without the consent of the municipality no one has any right to permanently use or occupy any portion of the public highways to the exclusion of others. The privilege is granted presumptively for the benefit of the public in securing the use of some agency of general utility; and when a consideration is received in return, it inures to the benefit of the community by going into the public treasury. It can therefore be readily seen that such transactions have many of the elements of a contract. The concession cannot be regarded otherwise than as a valuable property right the revocation of which after acceptance might entail serious damage. If the original franchise relied upon in this case was one which the city of Texarkana had the authority in the first instance to grant, one which public policy did not prohibit, it was a concession entitled to the protection generally accorded to vested rights secured by contracts. *New York, Lake Erie & Western R. R. Co. v. Commonwealth of Pennsylvania*, 153 U. S. 628, 14 Sup. Ct. 952, 38 L. Ed. 846; *City of St. L. v. W. U. Tel. Co.*, 148 U. S. 93, 13 Sup. Ct., 485, 37 L. Ed. 380; *Louisville Trust Co. v. City of Cin.*, 76 Fed. 296, 22 C. C. A. 334; 3 Abbott, Municipal Corp. § 297; *Mayor v. Houston Ry. Co.*, 83 Tex. 555, 19 S. W. 127, 49 Am. St. Rep. 679; *Jumbo Cattle Co. v. Bacon*, 79 Tex. 12, 14 S. W. 840; *City of Detroit v. Detroit R. Co.*, 184 U. S. 378, 22 Sup. Ct. 410, 46 L. Ed. 607; *City Ry.*

Co. v. Citizens' St. Ry. Co., 166 U. S. 558, 17 Sup. Ct. 653, 41 L. Ed. 1114; 3 Abbott, Municipal Corp. §§ 896, 919, and cases cited. There seems to be no question made as to the existence of that authority on the part of the city at the time it granted the franchise here claimed. To refuse protection to such concessions as this would expose valuable privileges purchased for a consideration, and extensive investments in property, to the arbitrary control of municipal governments, and thus permit the practical confiscation of valuable rights. It is no answer to the proposition stated to say that a city cannot part with its police power over its highways, for within certain limitations this can be done, and, when it is done, the dominion cannot be arbitrarily resumed when private rights have intervened and there has been no departure from the conditions imposed in making the concession, or those necessarily implied by law. Broadly stated, the police power of the city is the power to govern, exercised either by restriction or compulsion, in promoting the general good of the people. Freund, Police Powers, pp. 2, 8. While it is true that the city cannot surrender that portion of its police power the exercise of which is essential to the promotion of the general welfare in protecting personal and property rights, it can make concessions by which the general welfare is promoted in securing the services of some public utility, and which does not involve the surrender of its necessary governmental functions. The fact that the city cannot divest itself of the power to remove an unlawful obstruction from its highways does not prove that it may not grant to others the right to permanently use portions of those highways for a public purpose when such use does not amount to a nuisance. When the city of Texarkana granted the franchise to the appellant authorizing it, for the consideration named, to use and occupy the streets and alleys for carrying on its business, it did not surrender any governmental function or divest itself of any power necessary to protect its citizens against any unlawful invasion of their rights. It merely granted an easement upon the assumption that the service thereby secured would operate to the public benefit, and exhausted its power to demand a further consideration from appellant for the privilege conferred till the expiration of the grant. The terms upon which the right was granted fixed only the contractual relations of the parties; and the easement—that which the city could grant—became vested. If the city can at this time demand and collect from the appellant a further license fee as a rental or charge for the use of the streets, it puts the appellant in the attitude of being compelled to continue its use of the franchise upon terms which it might not have accepted in the beginning, or of surrendering its right and losing valuable improvements made upon the faith of the original grant. To permit the exercise of such authority would sanction the enactment of a measure violative of contractual obligations. None of the authorities cited by appellee support its contention further than to hold that the levy and collection of a license fee for the privilege of enjoying special rights upon the streets is an exercise of

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the police power. But none of them go so far as to say that this burden may be imposed upon one a second time for the same franchise after a previous grant. We do not hold that the ordinance in question is invalid, but that those provisions which authorize the levy and collection of the license fee cannot be enforced against the appellant company, for the reason that the appellee had previously granted the franchise under which it was occupying the streets of the city.

The judgment of the county court is reversed, and judgment here rendered for the appellant. All costs both of this court and of the court below are adjudged against the appellee.

SHERBURNE v. PORTSMOUTH.

1904. 72 N. H. 589.

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BILL in equity, to restrain the defendant city from building a baseball park at the Plains, a public common containing about eleven acres, which was given to the city in 1716 for the drawing of a militia for the town and province and has been used since for that purpose and by the public generally for a playground; also to restrain the city council from voting to fence the Plains "for the purpose of amusement and the better protection of city property." The bill alleges that the city councils intend, under this vote, to enclose the greater part of the Plains with a high board fence and give the control of the premises to certain individuals who will use them for a baseball park and athletic field, and will exclude all who do not pay an admission fee. The plaintiffs are taxpayers in Portsmouth and own property adjoining the Plains. The questions of law arising upon the defendants' demurrer were transferred from the October term, 1903, of the Superior Court, by *Pike, J.*

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YOUNG, J.¹ . . . The Plains being a public common, the city councils have power to regulate its use. P. S., c. 50, § 10, cl. XIV. The only limitations upon their right to determine the uses to which it may be devoted are that they must be public, intended to promote the object for which it was given, and that they do not constitute an unreasonable use of the land. They may devote the Plains to any uses within these limits that seem to them to be wise and intended to promote the best interests of the public. They may permit an individual or an association to occupy the whole or a part of the Plains for the purpose of furnishing the public with recreation. As an incident of their right to permit an individual to give exhibitions at the Plains, they may permit him to erect the structures necessary to carry on the business, if that would be a reasonable use of the premises. But if,

¹ So much of the opinion as discusses the power of the court to restrain city councils by injunction is omitted. — Ed.

considering its situation and surroundings, using the Plains for a baseball ground would constitute an unreasonable interference with the rights of the adjoining proprietors, or if the erection of structures incident to such use would constitute an unreasonable interference with the right of the public to use the premises, the city councils cannot permit any one to use the Plains for that purpose; for it would be permitting him to maintain a nuisance, and the city no more than an individual can authorize the maintenance of a nuisance. If the city councils may permit an individual to use the Plains for a baseball park, they can only give him the exclusive control of the premises for a reasonable time; for the public cannot be excluded from the premises for an unreasonable time. What would be a reasonable time, whether maintaining a baseball park at the Plains would be a reasonable use of the premises, and whether the erection of the structures incident to such use would be an unreasonable interference with the right of the public to use the premises, are all questions of fact. *Ladd v. Brick Co.*, 68 N. H. 185.

Even if the city councils may permit an individual to build a baseball park at the Plains, they cannot build one with the city's money; for they can use that only for the purposes named in section 4, chapter 40, Public Statutes, or for the purposes for which money may be raised by taxation. *Gove v. Epping*, 41 N. H. 539; *Merrill v. Plainfield*, 45 N. H. 126. This does not authorize cities to build baseball parks. Neither can they build one under the name of fencing the Plains; for it is axiomatic that they may not do by indirection that which they could not do in a direct proceeding. Although they may use public funds to build such a fence as they consider necessary to protect the property or to make it more attractive, they cannot use the money of the city to build such a fence as would be necessary to make the Plains available for exhibition purposes, any more than they could use it to build a grand-stand or any other structures which constitute the equipment of a baseball park; for such a fence would neither increase the attractiveness of the property nor be necessary for its protection.

The fact that the plaintiffs' property adjoins the Plains will not prevent the city councils from making any reasonable use of the premises which they think will be for the public good. The plaintiffs have no right in the Plains not common to every taxpayer in Portsmouth, except that of preventing the city from making an unreasonable use of the premises; for it does not appear that they derived their title from the city after the Plains had been dedicated to public uses, nor that its dedication and the sale of the lots that adjoin it were parts of the same transaction.

Notwithstanding the court has jurisdiction to enjoin the city councils when they are acting in their administrative capacity if the proposed action is illegal, they cannot be enjoined from passing the resolution to fence the Plains, for the resolution itself is legal; it only authorizes

the building of such a fence as is necessary to protect the property and to make it more attractive. But the city councils may be enjoined from taking any action under this resolution toward building a baseball park and from permitting any person to build one at the Plains, if that would be an unreasonable use of the premises.

Demurrer overruled.

PARSONS, C. J., and WALKER and BINGHAM, JJ., concurred: CHASE, J., concurred in the result solely on the ground that the proposed action of the city councils will convert a public common or square into a private park, — a change that they have not power to make, — and that an appropriation of the city's money for such purpose would be unauthorized and illegal, and may be enjoined at the suit of taxpayers.

STROCK v. EAST ORANGE.

1910. 77 Atl. Rep. 1061.

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PARKER, J.¹ In *Strock v. East Orange*, 77 N. J. Law, 382, 72 Atl. 34, we set aside a resolution of the playground commissioners of East Orange granting a permit for the use of the local playground, for the reason that section 3 of the playground act as amended in 1908 (P. L. p. 165) established an illusory classification of playgrounds by acreage; and also because it permitted a use of municipal property that was tantamount to giving it in aid of individuals or associations. Subsequent to this decision the Legislature passed a supplement to the playground act in 1909 (P. L. p. 76) apparently designed to cure these defects, and which enacts as follows: "The board of playground commissioners created or constituted in any city of this state, in order to provide the funds, in whole or in part, necessary to improve, maintain and police the playground or recreation places under its control, shall have the power and authority to arrange and provide for the giving of outdoor exhibitions, concerts, games and contests, and the power and authority to use and employ the said playgrounds or recreation places for the purpose of giving thereon outdoor exhibitions, concerts and contests, and said board shall have the power and authority to charge and collect a reasonable admission fee for each person entering such playground or recreation place, during the time or times when the same is being used or employed for such purpose; provided however, that the said board shall not use or employ any such playground or recreation place for such purpose for a greater period than eight hours in any week, nor on more than two days in any one week, and when any such playground or recreation place is used for such purpose no admission fee shall be charged or collected from children under twelve years

Stat. grant of power

¹ Part of the opinion is omitted.—Ed.

of age." In pursuance of this supplement, the playground commissioners in February, 1910, passed the following resolution, which is now before us on certiorari: "Resolved, that the board of playground commissioners of the city of East Orange, does hereby determine it shall and will, under the authority of the act of 1909, for the purpose of providing funds for the maintenance, care and policing of the playground, provide for the playing of baseball games at the East Orange Oval on the afternoons of the first and third Saturdays of June, July, August and September of this year, at which games an admission fee of twenty-five cents shall be charged to all persons over the age of twelve years. Be it further resolved, that the secretary of this board be and he is hereby directed to arrange for such games with suitable teams of ball players upon terms most advantageous to the city of East Orange, and not exceeding in any case payment of more than forty per cent. of the net receipts to the baseball teams which are to play any of said games. Provided, that each and every proposition for the playing of such games shall before it becomes binding be submitted to and approved by this board. Resolved, that it is the sense of this board that permission be granted to the State Y. M. C. A. to hold an athletic meet and baseball game at the East Orange Oval, Saturday, June 11, 1910, upon the following terms; an admission fee of twenty-five cents be charged to all persons over the age of twelve years; the State Y. M. C. A. to pay all the expense of advertising and all other incidental expenses, and the State Y. M. C. A. to receive forty per cent. of the net receipts." The question now submitted is whether the supplement of 1909 and the resolution of 1910 passed thereunder are invalid for the reasons given in the former opinion of this court respecting the other resolutions, or for any other reason.

It will be observed that the acreage clause is eliminated from the statute of 1909, and therefore that point is out of the case; the statute applying to all playgrounds irrespective of area.

It should be noted that by the act of 1909 the playgrounds cannot be used in any one week on more than two days, nor for a total period of more than eight hours. This seems to dispose of our criticism that by the act of 1908 the commissioners were in effect empowered to permit private organizations to monopolize the ground for the entire season.

The act of 1909 further differs from that of 1908 in resting the authority to use the playground for exhibitions, etc., on the theory of raising funds to provide for the improvement, maintenance, and policing of the playgrounds, and in contemplating the collection for that purpose by the commissioners of a reasonable admission fee; whereas, in the amendment of 1908, nothing is said about revenue or the collection of admission fees, but the board was left free to give the use of the playgrounds without compensation and thus enable the licensee for the time being to make money out of them...

Another difference worthy of note, although perhaps not so impor-

tant, is that instead of granting permits to organizations or individuals, as contemplated by the act of 1908, the new statute speaks of "arranging and providing for the giving of exhibitions," etc. The difference in the scheme seems to be plain. Instead of undertaking to endow the playground commission with power to give away the use of public property for nothing, and for indefinite periods by successive permits, thereby depriving the public of any opportunity of using the playground except on payment of an admission fee, and then only for the purpose of witnessing an exhibition, the Legislature has formulated a plan for the partial and restricted use of the playgrounds for exhibitions under the direct auspices of the commissioners, and with the requirement that the net receipts shall be used in payment of expenses for policing, maintenance, and improvement.

We are asked to declare this act unconstitutional on the ground previously urged as affecting the act of 1908, viz., that it authorizes the giving away of public property for private benefit; but an act of the Legislature should not be declared unconstitutional unless it is clearly so, and any reasonable construction of the act that will save it should be adopted. Such a construction we think is available in the present case. We think that the giving of occasional athletic exhibitions is not inconsistent with the idea of a playground, but entirely germane to it. The playground, after all, is nothing but a modified park, a place for public resort and recreation, and considerable latitude is allowed to municipal bodies in charge of parks in the matter of furnishing or arranging for special facilities to certain portions of the public, in consideration of a special charge for the same. Park concessions for restaurants, boats to hire, donkey rides, rolling chairs, and so on, are familiar to every one; and the payment of a special charge for each of them is a matter of course.

The practice of letting out concessions on public grounds for revenue purposes is expressly recognized by statute in the case of seashore cities. P. L. 1900, p. 285; P. L. 1904, p. 199. See 28 Cyc. 938. So, also, the authorities may even exclude the general public for a time and restrict the use of the park for that period to a limited portion of the public, so long as the length of time is not unreasonable. 28 Cyc. 937. In *Sherburne v. Portsmouth*, 72 N. H. 589, 58 Atl. 38, a New Hampshire case, the use of a common for a baseball ground was under discussion, and the court was of opinion that the test of legality was whether the use was public, in accordance with the dedication, and not an unreasonable use, especially as to time. We think this view is a sound one, and that it may safely be adopted for the purposes of the present case. The question of dedication, as will appear presently, does not arise in this case. That the proposed use is public we think satisfactorily appears. While not appropriate to the entire public, it is adapted for a considerable portion of the public and intended to furnish that portion, for a limited period, with legitimate recreation. It is quite as public in character as donkey rides for children and

restaurants for the hungry in a park. The period of time, also, is strictly limited to eight hours in a week, which the Legislature by so enacting has declared to be reasonable, and which manifestly is reasonable.

But it is claimed that the provision for charging entrance fees is for the purpose of raising revenue, and consequently an exercise of the power of taxation, and thus creates a double taxation by requiring taxpayers to pay an additional fee to use the grounds purchased and otherwise maintained with their money. But we do not think this can fairly be called double taxation, because the necessary effect of charging an entrance fee is to reduce pro tanto the amount necessary to be raised by general taxation. Whether the amount received will probably be adequate for that purpose is a question left by the Legislature to the business judgment of the commissioners, and will be a test of the propriety of their action in a particular case, but not a defect in the law itself.

So we do not think that the act of 1908, fairly construed, justifies or authorizes the park commissioners to give away any municipal property or the use of it. We think, on the other hand, that a proper construction of the act requires them to collect a fair and reasonable compensation to the city for the limited period of time for which the use of the playground may be granted. This idea is embodied in the words "arrange and provide for" and in the further provision that the board may charge an admission fee. So long, therefore, as the commission in arranging for the giving of outdoor exhibitions, etc., do so on reasonable terms which should secure a fair revenue for the city from the privileges granted to the limited extent permitted by the present statute, we do not think that its action in arranging for an exhibition with individuals or organizations on a percentage basis is illegal. The test will be whether the proportion of the receipts coming to the city is reasonable or otherwise, and this point is not made in the present case.

Comp. to city

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FORT WAYNE v. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY.

1892. 132 Ind. 558.

COFFEY, J.¹ This was an action brought by the appellee against the appellant, the city of Fort Wayne, ^{Ry} to enjoin the latter from opening a street across the yard and tracks of the appellee situated within the limits of the city. The material facts in the case, as they appear in the special findings of the court, are, that in the year 1866, the city

¹ Only so much of the opinion as discusses the power of the city to grant the land is given. — ED.

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of Fort Wayne acquired a tract of land in fee simple, by purchase and deed, contiguous to the city for the purpose of a public park. The deed to the city contained no limitation nor conditions as to the purpose for which the land was purchased or was to be used, nor did it contain any restrictions as to the power of the city to convey the same. On the 23d day of March 1869, and before any steps had been taken to convert the ground into a public park, the common council of the city adopted a resolution by the terms of which it granted to the Fort Wayne, Jackson and Saginaw Railroad Company twenty acres of the land off of the west side of the tract, upon the condition that the railroad company should run its line through the tract so granted, and locate its depots for local purposes thereon, and also locate any shops it might find necessary to build at Fort Wayne upon the same tract; and upon the further condition that the property and the north side addition to Fort Wayne should become annexed to and become a part of the city of Fort Wayne. The resolution further provided that when the railroad company had complied with the conditions of the grant the mayor of the city should execute to it a deed of conveyance for the land donated. The city also reserved the right to cross the tracks of the appellant whenever it should determine to lay off an addition composed of the remainder of the tract.

The donation of this land was made for the purpose of inducing the railroad company to make the city of Fort Wayne its southern terminus, and to induce it to locate its depots for local purposes and its shops thereon. Prior to February, 1871, the railroad company accepted the donation on the terms and conditions expressed in its resolution, took possession of the land and constructed its road-bed through the same, put in side tracks and switches, and erected a depot building thereon on the faith of the resolution, and located its yards on the ground for making up its trains, storing cars and conducting its business as a passenger and freight railroad, and prior to the 12th day of March, 1872, had expended in so doing several thousand dollars. On the 12th day of March, 1872, the common council of the city passed a resolution directing the mayor of the city to execute to the railroad company a deed for the land, which he accordingly did on the 26th day of the same month.

The general rule is that municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute. 2 Dillon Municipal Corporations (3d ed.), p. 569; *Shannon v. O'Boyle*, 51 Ind. 565; 1 Washb. R. P. (3d ed.) 64; *Reynolds v. Commissioner, etc.*, 5 Ohio, 204; *Beach v. Haynes*, 12 Vt. 15; *Jamison v. Fopiana*, 43 Mo. 565; *Board, etc., v. Patterson*, 56 Ill. 111; *Platter v. Board, etc.*, 103 Ind. 360; *Newbold v. Glenn*, 67 Md. 489.

Municipal corporations cannot dispose of property of a public nature in violation of the trusts upon which it is held, nor of a public common; but there is a distinction between property purchased for a

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public common and not yet dedicated, and property which is purchased for that purpose and actually dedicated to that use.

The case of *Beach v. Haynes*, *supra*, is very much in point here. In that case land had been purchased for a public common, and it was so expressed in the deed of conveyance, but before it was actually dedicated to that use it was conveyed away by the town of Westford, in which was vested the fee simple title, and it was held that such conveyance vested in the grantee a good title. But in the later case of *State v. Woodward*, 23 Vt. 92, it was held that a municipal corporation could not convey away a public common after it had been actually dedicated to the public use. Of course, the deed which vests title in the municipality may be of such a character as to dedicate the property to the public use, but such is not the case here. The deed to the city of Fort Wayne for the land in controversy vested in it the fee simple title without limitation or restriction as to its alienation. Such being the case, we think the city had the power to convey it for private use at any time before it was dedicated as a public park. Such seems to be the tenor of all the authorities upon the subject. 11

HURON WATERWORKS CO. v. HURON. 124

1896. 7 S. D. 9.

Action by certain taxpayers of the city of Huron to have the sale to the Waterworks Co. of waterworks belonging to the city declared void.¹

CORSON, P. J. . . . The city of Huron was incorporated under a special charter, and there are only three sections called to our attention as bearing upon the question, which are as follows: Section 1 provides: "That the city of Huron . . . shall have power to make all contracts necessary to the exercise of its corporate powers, to purchase, hold, lease, transfer and convey real and personal property for the use of the city . . . and to exercise all the rights and privileges pertaining to a municipal corporation." Section 7, pt. 8, provides as follows: "The city council shall have power . . . to organize and support fire companies, hook and ladder companies, and provide them with engines and all apparatus for extinguishment of fires, . . . to construct and furnish reservoirs, wells, cisterns, aqueducts, pumps and other apparatus for protection against fires, and to establish regulations for the prevention and extinguishment of fires." Section 7, pt. 9, provides as follows: "The city council shall have power . . . to construct and maintain waterworks and make all needful rules and regulations concerning the distribution and use of water supplied by such waterworks." 11

¹ Statement of facts and arguments and part of the opinion omitted. The above statement is substituted for that of the Reporter. An action by the Waterworks Co. against the City was consolidated with the taxpayers' action. — Ed.

// The waterworks of said city, as found by the court, were constructed and used by said city of Huron for protection against fire and for domestic purposes, and it had been so maintained and used for a number of years prior to said alleged sale. They were constructed by the corporation and at the expense of the same. No express power to sell or convey said property has been conferred upon the mayor and common council of said city, nor upon the corporation itself, unless such power is included in the powers conferred upon the city by section 1, which, as we have seen, provides "that the city of Huron . . . shall have power . . . to purchase, hold, lease, transfer and convey real and personal property for the use of the city, . . . and to exercise all the rights and privileges pertaining to a municipal corporation." The counsel for the respondents concedes that there is a class of property owned by a city that the common council of a city do not possess the power to sell, and he admits that public parks, squares, commons, cemeteries, etc., come within this class; but he insists that the waterworks of a city, though constructed by the city at the expense of the corporation, and used for protection against fire, and for the purposes of supplying pure and wholesome water to the citizens, do not belong to this class. It is necessary, therefore, to determine the nature and character of waterworks properly held by a city. The grounds upon which municipal corporations are denied the power to sell and convey the class of property above referred to are that such property is held by the corporation for public use, and is therefore charged with a public trust of which the corporation cannot divest itself, except by the express authority of the lawmaking power of the state.

The duties imposed upon municipal corporations for governmental purposes purely need not be considered, as it cannot be claimed that the exercise of the power to create and maintain city waterworks is strictly a governmental purpose, so far as it relates to the state at large. Neither are public squares, parks, wharves, cemeteries, landing places, fire apparatus, etc., held for governmental purposes, in the sense that they relate to the general public of the state; but they are governmental in the sense that they exist for public use, — that is, for that portion of the public embraced within the limits of the city. This distinction is well stated by Judge Dillon in his work on Municipal Corporations. That learned author says: "As respects the usual and ordinary legislative and governmental powers conferred upon a municipality, the better to enable it to aid the state in properly governing that portion of its people residing within the municipality, such powers are in their very nature public, although embodied in a charter, and not conferred by laws general in their nature and applicable to the entire state. But powers or franchises of an exceptional or extraordinary or nonmunicipal nature may be, and sometimes are, conferred upon municipalities, such as are frequently conferred upon individuals or private corporations. Thus, for example, a city may be expressly authorized in its discretion to erect a public wharf, and charge tolls

for its use, or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. In one sense such powers are public in their nature, because conferred for the public advantage. In another sense, they may be considered private, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality as distinct from the public at large. In this limited sense, and as forming a basis for the implied civil liability for damages caused by the negligent execution of such powers, it may be said that a municipality has a private as well as a public character. And so, as hereafter shown, a municipality may have property rights which are so far private in their nature that they are not held at the pleasure of the legislature." 1 Dill. Mun. Corp. § 27. While parks, squares, wharves, landing places, fire apparatus, etc., are not absolutely necessary, to enable a municipal corporation to perform its strictly governmental duties, so far as they relate to the state at large, they are so far held for governmental purposes that they cannot be appropriated to any other use without special legislation. Mr. Chief Justice WAITE, in speaking of this class of city property in *Meriweather v. Garrett*, 102 U. S. 473, says: "(1) Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation." And Mr Justice FIELD, in the same case (page 513) says: "What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not properly held in trust for the public, for of such property the corporation is the mere agent of the state. In its streets, wharves, cemeteries, hospitals, court-houses and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses."

It is difficult to perceive upon what principle a distinction can be made between the waterworks of a city, constructed at the expense of the corporation and used to supply water for fire purposes, domestic use, and other city purposes, and public parks, squares, fire apparatus, public buildings, etc., used for public purposes, and the courts in the latter decisions seem to make no such distinction. Judge DILLON, in his work above referred to, says: "In some of the states it is held that the private property of municipal corporations — that is, such as they own for profit, and charged with no public trusts or uses — may be

sold on execution against them. . . . On principle, in the absence of statutable provision, or legislative policy in the particular state, it would seem to be a sound view to hold that the right to contract and the power to be sued give to the creditor a right to recover judgment, that judgments should be enforceable by execution against the strictly private property of the corporation, but not against any property owned or used by the corporation for public purposes, such as buildings, hospitals, and cemeteries, fire engines and apparatus, waterworks, and the like; and that judgments should not be deemed liens upon real property, except when it may be taken in execution." Dill. Mun. Corp. sec. 576. It will be noticed that Judge DILLON places waterworks in the same class with public buildings, hospitals, cemeteries, etc., and in this the learned author is fully supported by the very able decision of the Supreme Court of the United States in *New Orleans v. Morris*, 105 U. S. 600. Mr. Justice MILLER, speaking for the court, says: "The learned counsel, in the oral argument and in the brief, substantially concedes that the waterworks themselves, in the hands of the city, were not liable to be sold for the debts of the city. And, if no such concession were made, we think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility and necessity that they were held in trust for the use of the citizens. In this respect they were the same as public parks and buildings, and were not liable to sale under execution for ordinary debts against the city. . . . In the next place, the city was not situated, as regards this property, as a private person would be in the purchase and acquisition of ordinary property. The city could not have sold this property as the law stood. It could not have put it into a joint stock company without the aid of a new law. The legislature, in authorizing the change in the form of the ownership of the waterworks, could, since it injured nobody and invaded no one's rights, say, as to the city, whether it be called new property or not, that such ownership could continue exempt from execution. As the city was using no means in acquiring this stock which could have been appropriated under any circumstances to the payment of the debts of the appellees, the legislature impaired no obligation of the city in declaring the stock thus acquired exempt from liability for debts." This decision is important, not only as being made by the highest court of the nation, but as being the unanimous opinion of that court upon the question, and made subsequently to the decision in the *Meriweather* case, above cited. It is clear and to the point that the waterworks of a city belong to the same class of property as "wharves, parks," etc., and holds distinctly that the waterworks property of a city cannot be sold, except by authority of the legislature, and the court says: "We think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility that they were held in trust for the use of the citizens." The same view is taken by the Court of Appeals in the state of New York in the case of *City of Rochester v.*

Town of Rush, 80 N. Y. 302. In that case the court says: "The argument of the appellant that the property in question would properly be exempt from a city tax, as it was procured by a tax upon property within the city, but not from a county tax, but the people of the county were not taxed to procure it, would apply with equal force to the city hall and engine houses and machines and equipments which make those houses necessary, and, if sound, would subject them to the hazard of sale under a treasurer's warrant for the enforcement of a county tax. I am unable to perceive that in any sense the waterworks can be regarded as the private property of the city, as distinguished from property held by it for public use. These considerations lead to the opinion that the property was not taxable, and that the proceedings on the part of the assessors of the town of Rush in regard thereto cannot be sustained."

The supreme court of Connecticut in the well considered case of *Town of West Hartford v. Board of Water Com'rs.*, 44 Conn. 360, lays down the same doctrine. In that case, the court says: "The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public good, in the judicial sense of that term; not indeed, as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order. For this purpose the legislature invested the city with a portion of its sovereignty, and authorized it to enter within the territorial limits of West Hartford, and condemn by process of law certain lands therein for the purpose of storing water for its own inhabitants. It authorized the assessment of a tax upon property within the city of Hartford for money wherewith to pay for this land, because the taking and holding was for the public good." Having, as we think, established the proposition, that the waterworks of a city, when constructed and owned by the city, are to be regarded the same as other city property held for public use, and therefore charged and clothed with a public trust, it would seem to follow that such property cannot be sold and conveyed by the mayor and common council of the city, unless under special authority conferred upon them to so sell and convey the same, by the legislative power of the state. Judge Dillon says in his work before referred to, that they (municipal corporations) cannot dispose of property of a public nature, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons. See 2 Dill. Mun. Corp. sec. 575, and cases cited. In the recent case of *Roberts v. City of Louisville* (decided in 1891) 17 S. W. 216, the same doctrine was laid down by the supreme court of Kentucky as to the wharves held by the city of Louisville. In that case the court says: "The power of a municipal corporation to acquire land for the purpose of erecting wharves thereon, and to charge wharfage, is not a necessary incident of its charter, but must, like all its other powers, be derived directly from the legislature,

of course to be exercised within the limits and upon conditions of the grant. Dill. Mun. Corp. sec. 110. And, looking to the nature and purpose of such special grant, it must be regarded as a trust, involving duties and obligations to the public and individuals which cannot be ignored or shifted; for the power to acquire implies the duty of the municipality, through its governing head, to maintain and preserve wharf property for the benefit of the public, without discrimination or unreasonable charges for individual use. In every instance, so far as we have observed, wharf property of the city of Louisville has been acquired under act of the legislature, and paid for by taxation; and in no case is there evidence of legislative intention it should be held otherwise than in trust for use of the public, and in aid of trade and commerce. The wharf property being so held, the city of Louisville cannot transfer its title or possession, nor, according to a plain and well-settled principle, can the general council, which is by statute invested with power of control, and burdened with the duty of maintaining, preserving and operating the wharves, either delegate the power or disable itself from performing the duties." In that case the judgment of the court below dismissing the bill for an injunction was reversed, the court, in effect, holding that an injunction enjoining the mayor and common council from making the sale should be granted. In the case of *Smith v. Mayor, etc., of Nashville*, 12 S. W. 924, also a late decision made in 1890, the Supreme Court of Tennessee says: "It is seen at once that the waterworks are a corporate property. That is not denied. The debate is with respect to the nature of the use. As to that, for the sake of convenience, we divide all the purposes for which the city furnishes water into three classes: (1) To extinguish fires and sprinkling the streets; (2) to supply citizens of the city; (3) to supply persons and factories adjacent to but beyond the corporate limits. If the business were confined to the first class, there would be no ground to base a decision on, so clearly would the use be exclusively for public advantage. We think there can be but little more doubt about the second class, especially in view of certain words in the city charter, to which we will advert presently. . . . Having accepted the charter, and undertaken to exercise this authority in the manner detailed by the witness, it cannot be held that the city in doing so is engaging in a private enterprise, or performing a municipal function for a private end. It is the use of corporate property for corporate purposes, in the sense of the revenue law of 1877. It can make no difference whether the water be furnished the inhabitants as a gratuity or for a recompense, the sum raised in the latter case being reasonable, and applied for original purposes."

From this examination of the authorities, we conclude that there is no distinction between the nature of waterworks property owned and held by the city, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, courthouses, fire engines, and apparatus, and other property owned and held by the city for public use. All such

property is held by the municipality as a trustee in trust for the use and benefit of the citizens of the municipality, and it cannot be sold or disposed of by the common council of the city, except under the authority of the state legislature. Such property, as before stated, is private property, in the sense that the municipality cannot be deprived of it without compensation, no more than can a private corporation be deprived of its property by the law-making power. But such property is so owned and held by the municipality as the trustee of the citizens of the municipality, for the use and benefit of such citizens. It has been acquired by the corporation at the expense of the taxpayers of the city, for their use and benefit, and the law will not permit the corporation to divest itself of the trust, nor to deprive the citizens of their just rights as beneficiaries in the same.

DE MOTTE v. VALPARAISO. 125

1903. 161 Ind. 319.

DOWLING, J. The appellants, who are described as residents and taxpayers of the city of Valparaiso, brought this suit to enjoin a threatened sale and transfer by said city of a right to purchase a system of water-works owned by a private company, and constructed and used in the streets, alleys, and public grounds of said city, reserved to and held by said city in and under a contract between said city and George P. Smith and others made February 16, 1885. The part of said contract which is material here is as follows: "At any time after the expiration of fifteen years from the completion of said water-works the city shall have the right to purchase the same by giving the owners thereof one year's notice in writing, and in case of purchase the city shall pay a reasonable value for the same which shall be ascertained by three disinterested hydraulic engineers, one to be chosen by the city, one by the owners of the water-works, and the third selected by the two thus chosen." The works were completed December 31, 1885, and afterwards Smith and his associates sold and transferred the same, with all rights, franchises, and privileges created by the said ordinance, to the Valparaiso City Water-Works, which has ever since owned and operated them. The city has a population of more than 5,000 inhabitants, and less than 7,000, and is organized under the general laws of this State for the incorporation of cities. It is indebted beyond two per centum of the valuation of its taxable property, its indebtedness being about \$95,000, and the appraised value of its taxable property for the year 1902 being \$2,800,000. Its current revenues of late years have been insufficient to pay its general expenses and the interest on its debts. It is averred in the answer, among other things, that the said water-

works had never been owned by said city, and had never been dedicated to any public use.

A demurrer to the answer was overruled, and this decision is assigned for error.

The question presented is whether the city has the power to sell and transfer its right to purchase said water-works, so reserved in the ordinance.

It is contended by counsel for appellees that such reserved right is held in trust by the city for public purposes in the same manner and subject to the same restrictions upon the power of the city to sell and convey it as the water-works themselves would be held if owned and operated by the city. *Lake County Water & Light Co. v. Walsh*, 160 Ind. 32; *Pittsburg, etc., R. Co. v. Town of Crown Point*, 146 Ind. 421; *Trustees, etc., v. Mayor, etc.*, 38 N. J. L. 13, 97 Am. Dec. 696.

There is, in our opinion, an obvious legal distinction between a right of a city to purchase property for a public use, and the ownership of property actually dedicated to and employed for public purposes. It is not the fact that property may be devoted to public use by the city at some future day which constitutes the city a trustee for that use, but it is the circumstance that the property is actually so used. The city of Valparaiso is not the owner of the water-works, and may never acquire the title thereto, either because it has not the means with which to purchase the works, or for the reason that such purchase may not be deemed expedient. The property is now held by a private corporation, and will continue to be so held unless the city shall become financially able to buy it, and its acquisition shall be decided to be for the advantage of the city. If the city remains unable to purchase for lack of funds, or if it shall not be thought desirable to exercise the right of purchase, the service to the public rendered by the Valparaiso City Water-Works will continue to be of the same nature, extent, and efficacy, and upon the same terms, whether the city retains its right to purchase the works, or disposes of that right by a sale and transfer.

In *City of Ft. Wayne v. Lake Shore, etc., R. Co.*, 132 Ind. 558, 18 L. R. A. 367, 32 Am. St. 277, this court held that land purchased by the city of Ft. Wayne for the purposes of a public park, but never dedicated to such use, might be sold by the city under its general power to sell and convey property, real and personal, owned by it as a municipal corporation, although it could not do so if the land had been applied to the purposes for which it was bought, and was so used. We think this principle applies to the present case. As the right to purchase has not been exercised, and the city has not impressed its possible interest in the property with a public use, it may sell and transfer such right under its general power to sell and convey property which has not been dedicated to a public use.

Judgment affirmed.

Gillett, J., did not participate in this decision.

BAILY v. PHILADELPHIA. 126

1898. 184 Pa. 594.

BILL in equity to declare illegal and void a lease of the Philadelphia Gas Works.¹

MITCHELL, J. The gas works are the property of the city of Philadelphia, not as a municipality, but as a business corporation. However much the idea that the city is not required by its municipal duty to supply its citizens with light in the streets and public places, may seem to fall below the modern conception of a city, it is beyond question on settled legal principles, that in the performance of that function the city acts under authority merely and not under municipal obligation. This was the rule of the common law, and no statute in reference to the city of Philadelphia has altered it. Hence the city may change its mode of action, or cease to act altogether, in its discretion, and the discretion is purely legislative. The courts have no power to interfere unless the proposed action contravenes some express statute, or violates some binding contract. These principles are elementary and need not be enlarged upon, since they are conceded by the learned counsel for appellants, and the corollary admitted that the lease now sought to be enjoined would have been clearly within the power of the city prior to the Act of June 1, 1885, P. L. 37, commonly known as the Bullitt Bill.

The argument of the appellants is arranged under three heads, and may be conveniently considered in that order.

First, that the ordinance for the lease of the gas works is an interference with the executive functions of the department of public works, and therefore within the prohibition of the act of June 1, 1885. Of that act this Court has already declared that "the subject with which it deals is the administrative government of cities of the first class, and its manifest purpose was to reform existing abuses in the executive department of the only city of that class," *Com. ex rel. v. DeCamp*, 177 Pa. 112. The particular provisions of the act which are relied on by the appellants are art. I., sec. 1, "There shall be the following executive departments: . . . Department of Public Works;" art. IV., sec. 1, "The Department of Public Works shall be under the charge of one director who shall be the head thereof. Gas works owned and controlled by the city, the supply and distribution of gas . . . the lighting of streets, alleys, and highways . . . shall be under the direction, control, and administration of the Department of Public Works;" and art. XVI., "Councils shall by general ordinances provide for the proper and efficient conduct of the affairs of the city by

¹ Statement of facts and arguments omitted. — Ed.

the mayor and several departments, and the boards thereof; but they shall not pass any ordinances directing or interfering with the exercise of the executive functions of the mayor and departments, boards or heads or officers thereof." These provisions do not take away nor in any degree lessen any municipal authority previously lodged in the city, still less any merely business corporate power. They merely regulate the operation of its executive and legislative functions as to such public property of the enumerated classes as the city may at any time have. The prohibition to councils in article 16 is against interference with "the exercise of the executive functions" of the departments. The lease or sale of the gas works is not an executive function. If it was it would belong to the director of public works as the head of the department. But no one would contend that the director has any power to make a sale or such a lease. That is a parting with the title and possession of the city, which can only be done by a legislative act. As a legislative act it is within the clear power of the city. The right to change the property which is the instrument through which the city exercises its powers, is inherent in its ownership, whether municipal or merely corporate, unless prohibited by contract or by the terms of a trust upon which it was acquired. But to avoid all doubts the right of alienation is given in express words in the charter of 1789, all the powers granted in which were preserved by the consolidation act (Act of February 2, 1854, sec. 6, P. L. 25) and which appears to be still in force: Com. v. Walton, 182 Pa. 373. And the right is not taken away by the act of 1885, which, as already said, merely regulates the mode of exercise of executive, and incidentally of legislative, functions without changing the rights which appertain to those functions.

But it is urged that although the city may sell and change the specific property, it cannot abdicate the function, and must therefore substitute other property through which its control and operation of the franchise may be continued, and the analogy is relied on of a trustee with a power to sell, who may by virtue thereof change the subject-matter but cannot destroy the trust. This brings us back again to the preliminary question on which the whole case rests, whether supplying the public places and private citizens with gas for lighting purposes is a strictly municipal function, or merely a power conferred on the city as a corporation. If the former, it is a duty as well as a power, and cannot be abandoned; if the latter, it is an authority only and may be exercised or not at the city's option. Although the appellants start out with the concession that the lease in question would have been within the city's powers prior to the act of 1885, yet the elaborate and ingenious argument for them rests upon the contention that the lighting of the city, at least since that act, is a municipal duty, and though presented in different aspects and from different points of view, the argument constantly comes back to this contention, for without it there is confessedly no ground for the case to rest upon. But for reasons already stated, we are of opinion that

the act of 1885 made no change in the city's municipal powers, either inherent or statutory, but merely regulated their exercise so far as related to executive officers, and incidentally to such purpose restrained what had become legislative usurpation. Under that act, so long as the city owns and operates the gas works, it must do so through the department of public works, but there is no compulsion upon the city to continue the manufacture and sale of gas at all, or to do it through its own officers, if in its legislative judgment it is no longer expedient to do so.

The second proposition of the appellants is that the ordinance assumes in respect to the public lighting to delegate a public legislative power, and in respect to the private lighting to confer a monopoly on the grantee; and in both cases to bind the discretion of councils for a long term of years. It is manifest that this proposition in the use of the phrase "public legislative power" comes back, as already indicated, to the contention that public lighting is a municipal duty. It is true that it is a legislative power, in the sense that it is the exercise of the will of the owner with respect to ownership of the property. If such ownership was coupled with a municipal duty such duty could not be escaped by lease or other form of delegation. But the gas works, as already discussed, are held by the city as a business corporation. If the use of gas should be so far superseded as to make its manufacture and sale unprofitable, there is no compulsion on the city to continue it or to embark in any new venture for the supply of a different light. And if the management and operation of the works can be more profitably or more conveniently carried on by a lessee, instead of by the city's own immediate servants, the city in making a lease is determining a business question in its legislative corporate capacity, just as any private corporation might do, but is not delegating any municipal power, legislative or other, which involves municipal duty.

In regard to the conferring of a monopoly, the appellants cite the provision in the lease that "the city of Philadelphia agrees that during the term of this contract it will do nothing by ordinance or otherwise which will in any way interfere with, or limit, restrict or imperil this exclusive right hereby vested in the said United Gas Improvement Company, its successors or assigns," and claim that this creates a monopoly which is void on the ground of public policy. To this objection it would be a sufficient answer that, as already held, the city in this matter is acting in its business, not its governmental, capacity, and the owner of business property, even though a municipal corporation, may in dealing with it make such terms as in its discretion it deems best for its interest. When the owner of a business sells it with its good-will, etc., he may agree as part of the consideration to the purchaser, not to go into the same business again as a rival, within an agreed territory or for an agreed time. The city of Philadelphia selling its gas-making plant and good-will may do the same thing.

(2)
Public Lighting

But in the provision of the lease now under consideration the city does not assume to grant any franchise. It could not do so if it would.

What the city does is to covenant that it will do no act in the derogation of the right of the lessee under the grant to operate the gas works and supply the citizens with light therefrom. The franchise of the lessee to furnish light is not derived from the city but from the legislature; whether it is exclusive or not at present, or shall be exclusive or not in the future, does not and will not depend on the city, but on the legislature. All that the city does is to agree that it will do no act itself whereby the privileges granted by it to the lessee, and intended to be exclusive so far as it is concerned, shall be limited or interfered with. This was clearly within its powers in dealing with its business property. Whether the legislature may hereafter impose upon the city a municipal duty in regard to lighting which may conflict with its present contract is a question we need not consider until the case shall arise with proper parties in interest to such a question.

It is further argued that the lease undertakes to bind the discretion of councils for a long term of years. This again comes back to the contention that lighting the city is a strictly municipal or governmental function, as to which councils cannot bind their successors. But as already held the city is acting in its business capacity only, and the contract binds it in that capacity. All contracts which contemplate things to be done after the immediate present must, to that extent, bind and limit the power of the contracting party. This principle has already been adjudicated in its application to the city of Philadelphia and the gas works in the cases of the *Western Saving Fund Society v. Phila.*, 31 Pa. 175, *Same v. Same*, 31 Pa. 185, and *Wheeler et al. v. Phila.*, 77 Pa. 338.

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The last proposition of the appellants is that the ordinance impairs the obligation of the city's contract with certain holders of its bonds. This was the ground of decision in *Western Saving Fund Society v. Phila.*, *supra*. But the cases are not at all alike in the facts. In *Saving Fund Society v. Phila.* the ordinance of 1841 distinctly pledged the revenues of the gas works to the creditors for security of payment of the bonds, and provided for the management by trustees for that purpose. The ordinance of 1868, under which Mr. Campbell, one of the complainants, is a bondholder, has no such provision. The loan was made to the city, and upon the city's general credit, without any pledge of its revenues from the gas works or any other specified source. On the contrary the ordinance gave express notice in section 4, that the terms and provisions of the ordinance of 1841 should not apply in any way to this loan. Section 3 of the ordinance requires the retention by the trustees of the gas works of a certain per cent. of the amount of the loan, annually, and its payment into the city treasury, whereupon the city undertakes to apply part of it to the payment of the interest on the loan and to pay the other part into the sinking fund. These provisions are not part of the contract between the city

and the loanholders, but are terms imposed by the city on the trustees of the gas works as conditions on which the city will raise the money for the latter's use. Without these terms the city would have had to meet the bonds at their maturity out of general taxation, and could not have looked for repayment from the revenues of the gas works unless at the option of the trustees. By these terms the city guarded itself from this risk, and secured repayment to itself from the revenues of the department for whose use it had borrowed the money. But the requirements of this section were for the protection of the city only and involved no pledge to the loanholders. They loaned on the general credit of the city, and perhaps also on the faith of the sinking fund pledged for the payment of this and other loans. But there is no averment that the sinking fund has not been kept up by appropriation from the city treasury from time to time as required by law. Without such averment and proof it does not appear that any obligation of the loanholders contract has been impaired.

None of the grounds on which the court is asked to interfere can be sustained, and the injunction was rightly refused.

Decree affirmed at costs of appellants.

GUSHEE v. NEW YORK. 127

1899. 42 App. Div. 37.

RUMSEY, J.¹ On the bank of the Hudson river, on the west side of the city of New York, is situated Riverside Park, and upon an eminence at the upper end of that park stands a building with stables and other outbuildings, which has been fitted for a place of rest and refreshment for persons who have occasion to use the park. For some years, and certainly as far back as 1892, the department of parks had granted the right to keep a restaurant in the park either for a rental paid monthly, or for a certain portion of the receipts. In the month of March, 1896, the person who had been in possession of the restaurant left it for some reason, and an agreement was made between the authorities of the city by department of parks on the one hand and the plaintiff here on the other, by which there was granted to the plaintiff the right to keep this restaurant. That grant or license would, by its terms, expire on the 1st of April, 1897. On the 24th of February, 1897, the plaintiff applied for a renewal, and negotiations to that end were completed between the department of parks and the plaintiff in the month of November, 1897, at which time the department of parks, claiming to act for the city, granted to the plaintiff the privilege of selling refreshments in the building in the park which was known as "Claremont" for the term of five years from the 1st day of April,

¹ Part of the opinion and the dissenting opinion of BARRETT, J., are omitted.—ED.

1897, unless the agreement be sooner revoked or canceled or annulled, as therein provided. The plaintiff, on his part, agreed to enter upon the exercise of the privilege thereby granted, and to conduct the restaurant in a style and manner satisfactory to the department of parks, and under such restrictions, rules and regulations as might be prescribed by them.

He made further agreements as to the rates of charges and repairs and other matters which need not be considered here, and agreed to pay to the department for the privilege the sum of \$525 a month. It was further agreed that the agreement and privilege thereby granted were personal, and that the plaintiff would not assign the same, or any part thereof, without the written consent of the department.

The plaintiff made a further stipulation that he would conform, and require all persons in his employ to conform, to all rules, regulations, requirements and ordinances then prescribed, or which thereafter might be prescribed, by the department in relation to the conduct of the privileges thereby granted, and the general character of the furniture, fixtures, equipment, employees and all things pertaining thereto, or to the general management or government of said park. It was further agreed that if he should omit to keep any of the covenants, the agreement might, at the option of the department, be revoked, and should thereupon become null and void, and he should remove the building and premises, and cease to exercise the privileges granted to him.

The plaintiff alleges in his complaint that the department of parks threatens to eject and remove him from the possession of the building, and will do so unless it is restrained; and he brings this action to procure an injunction restraining the department from interfering with him in the conduct of his hotel or from preventing him from enjoying the privileges granted by this agreement.

Upon the trial the foregoing facts were established, and it was made to appear that on the 29th of April, 1898, the park commissioner of the boroughs of Manhattan and Richmond notified the plaintiff that he had that day revoked, canceled and annulled the license agreement under which he was conducting the hotel or restaurant in Riverside Park, known as "Claremont," and ordered the plaintiff to vacate the premises on or about the 15th of May, 1898. At the conclusion of the plaintiff's case, no testimony having been offered on the part of the defendant, the court directed judgment to be entered restraining the commissioner of parks from interfering with the plaintiff in the conduct of said hotel, and from in any way preventing the said plaintiff from enjoying the privileges granted to him by the agreement of November 8, 1897. From that judgment this appeal is taken.

The defendant insists that as this action is in equity, to restrain the defendant from putting an end to the agreement between it and the plaintiff, it must be based upon the theory that he has no legal right, as against the defendant, to the possession of this restaurant. This contention is not well founded. In view of the way in which the ques-

tions here are presented, it is not necessary to consider whether the plaintiff has a remedy at law for the grievance of which he complains. No such question was raised at the trial by motion, nor is there any allegation in the answer that the plaintiff has an adequate remedy at law. If the defendant proposed to rely upon that point it should have raised the question in its pleading; *Town of Mentz v. Cook*, 108 N. Y. 504; or at least should have taken the point upon the trial of the action. As it has not done so, it must be deemed to have waived that point.

The question is then presented whether the plaintiff, by this agreement, acquired any right which the courts would protect, either at law or in equity. By the terms of the agreement the plaintiff was bound to keep, maintain and conduct the restaurant in a manner prescribed therein. He was to keep the building in repair, and to maintain it in good and proper condition. This duty necessarily required him to take and keep possession of the buildings while the agreement was in force. He bound himself during that same time to pay for the rights he acquired the sum of \$525 a month. This agreement, involving, as it did, the possession of real estate and the payment of a monthly rent for it, was practically a lease. 4 Kent's Comm. 96, 97; *Taylor Landl. & Ten.* [8th ed.] § 38. At the time the agreement was made, the charter of the greater city had not taken effect, and the department of parks of the then city of New York was exercising the powers given to it by the Consolidation Act (Laws of 1882, chap. 410). By section 668 of that act, that department was required and empowered to control and manage all public parks. There is a well-recognized distinction between the duties imposed by the Legislature upon a municipal corporation for the public benefit and those acts which it does in what may be called its private character, in the management of property voluntarily held by it for its own use and advantage, although such use may ultimately inure to the benefit of the public. *Bailey v. The Mayor, etc., of New York*, 3 Hill, 531. The boundary between these two kinds of powers is shadowy and difficult of demarcation. Whether a city, in the control of property which it has taken for a park, acts in the one capacity or the other, it is difficult to say. It has been held by a court of high reputation that, in the opening and control of public parks, a city acts in its private capacity as the owner of land precisely as it does in the making of water works or the furnishing of gas. *Board of Park Comrs. v. Detroit*, 28 Mich. 228; *Dillon Mun. Corp.* [4th ed.] §§ 72, 73.

The department of parks acted, in making this agreement, in the exercise of the power given to it by the Legislature to control and manage the parks. The building in question was the private property of the city. It was proper that it should be utilized for the purpose for which it was used, if, indeed, it were not actually erected for that purpose by the city authorities. That in the control and management of the public parks of a great city it is perfectly proper to furnish

Lease

not only such innocent amusements as may enhance the pleasure of those who resort to the parks, but such opportunities for rest and refreshment for themselves and their animals as may be required, will not be disputed.

The doing of these things is no part of the public duty imposed upon municipal corporations as the agent of the State in the performance of its governmental functions, but rather a part of the business of the city which it may or may not undertake in its private capacity as the owner of the lands which have been set apart for park purposes. Whether these things shall be done at all, and, if so, to what extent, is a matter with which the State, as such, has no concern whatever, and which in no way affects the public duties of the city and has no connection with any function of government, strictly so called. The Legislature has imposed upon the city certain duties in respect of the maintenance of order and the punishment of crime. These duties are public and governmental in their nature and in the performance of them the city acts as the agent of the State. But such duties, whether imposed upon the city or upon the department of parks, are of an entirely different character from those which are imposed upon that department by the power which is given to it to make the parks useful and convenient for the pleasure and comfort of the citizens. Whether in doing those things the authorities shall act themselves, or whether they shall be performed by private persons under an agreement with the park authorities, must be left very largely to the discretion of those who have control of the parks. If in their judgment it shall seem better that the furnishing of refreshment shall be farmed out to some person for a consideration, subject to the regulation and control of the authorities, it cannot be said, as a matter of law, that such discretion is beyond their power. If in the exercise of that discretion it should be more advantageous to grant such a privilege for a fixed period, it certainly would not be beyond the power of the department, unless it interfered with some other power or prevented the discharge of some other duty which the Legislature imposed upon them, and with the exercise of which such an agreement was inconsistent. There is nothing in an agreement to permit these things to be done for a fixed period of time which of itself is outside of the power of the department of parks to control and manage the parks; and it cannot be said as a matter of law that any particular period for which such a license should be granted or agreement made, would be unreasonable or *ultra vires*, unless it interfered with some other and positive duty.

But it is said by the defendant that the making of this agreement, by which the possession of this house was given to the plaintiff for a term of five years, put it out of the power of the department of parks to exercise the duty imposed upon it of making rules and regulations, and enacting such ordinances as might be necessary for the government and protection of parks. The argument is that if it should happen that the commissioners of parks concluded that it was not best

to conduct a restaurant at "Claremont," they were precluded by the agreement with the plaintiff from closing the restaurant during the term of five years, and this is the reason why it is said that the agreement was beyond the power of the department of parks, and, therefore, is void.

In considering this point it must be remembered that it is not claimed on the part of the defendant that the department of parks has determined that no restaurant should be kept at this place and in this building, nor is there any evidence or suggestion that the plaintiff is not a perfectly proper person to keep it, or that he or any of his employees have failed to observe all the rules and regulations that have been made for the government of the park. It does not appear that any regulation or ordinance has been made or is intended to be made by the commissioners of parks or by the commissioner in charge of this park, which would in the slightest degree be affected by the plaintiff's continuing in this business at this place, or that the operation of this restaurant by him would be inconsistent with any regulation or ordinance which is intended to be made. Nothing of the sort has been proven, nothing of the sort is found by the court, and we would not, for the purpose of reversing this judgment, be at liberty to infer that anything of the kind existed; *Equitable Co-operative Foundry Co. v. Hersee*, 103 N. Y. 25. If anything of the kind did exist, it would present an entirely different question from that which confronts us here. The question as presented is simply whether this agreement by which the plaintiff is authorized for a fixed period to operate this restaurant, is so utterly void that he will not be protected in the exercise of his rights, but is liable to be removed at the mere caprice of the commissioners of parks without any suggestion that his presence or the continuance of his agreement interferes in the slightest degree with the performance of their duties. A decision in favor of the defendant involves the proposition that, without any reason, it may remove this man at its will from this restaurant, and put in some one else to keep it in the same circumstances and at the same rent. If that be the rule it would prevent the granting of such a license for any period, however short. It cannot be said, as a matter of law, that the granting of a license for five years is unreasonable, and we cannot make any such presumption for the purpose of reversing this judgment. The department of parks is one body, with a continuous existence, although its membership may vary from time to time. Its duty to exercise its discretion must continue unimpaired at all times, and it has no power to deprive itself of that discretion for a week, any more than it has for five years, so that it necessarily follows that if this contract cannot be made no other contract can be made which would entitle anybody to conduct this restaurant for any specified time, however short. It is apparent that, if that be true, the department of parks could never make any contract by which any person would undertake the conduct of this restaurant, for no intelligent

person would incur the expense necessary for this undertaking if he were liable at the mere caprice of the department to have his contract determined and to be removed immediately after he had made it. In our judgment no such absurd conclusion is required. The power to control and manage the parks necessarily involves the right to cause this restaurant to be conducted by some person with whom a contract shall be made for that purpose. Whatever contract is necessary for that purpose is made subject to the exercise by the department of parks of such other duties as the law devolves upon that department. The contract as made must be deemed to have been made in view of the possible exercise of that power if it becomes necessary to exercise it. We are not advised of any principle which requires that this contract should be held to be void unless it shall appear that it has become obnoxious to some regulation or ordinance which has been enacted for the government of the parks.

But the agreement is in terms subject to all rules, regulations and ordinances now prescribed, or that might hereafter be prescribed by the department, relating to the conduct of the privileges granted by it, and the general character of the fixtures, equipment, employees and all things appertaining thereto, and to the general management and government of the parks, and the plaintiff takes his contract subject to any such regulations. Even were no such provision in the contract, it would still be subject to any regulations or ordinances which the department of parks might see fit to enact for the better government of the parks, or the preservation of order in them, or for the performance in any other way of what might be called its governmental functions. As to those matters it cannot, by any such agreement, abdicate its functions or abandon the duty which the law has put upon it, nor can this contract be so construed as to control in any way the management or the exercise of those functions.

PIKE'S PEAK POWER CO. v. COLORADO SPRINGS. 128

1900. 105 Fed. 1.

BILL to enjoin the enforcement of an ordinance by which the city of Colorado Springs withdrew the right, previously given to the plaintiff, to use the water power of a stream which supplied the city with water.¹

SANBORN, Circuit Judge. . . . Another position urged by counsel for the appellee is that the system of waterworks of this city, its streets, parks, and public grounds, are held by the municipality in its political or governmental, and not in its proprietary or business, capacity; that, consequently, they cannot be converted from municipal uses, and a city

¹ This short statement is substituted for that of the Court. Part of the opinion only is given. — Ed.

council cannot make any agreement or contract relative to them which a succeeding council may not freely annul. The proposition is not novel. It has received the careful consideration of this court, and, so far as the question it presents is material to the issues in this case, it is no longer open to debate here. In *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 282, 22 C. C. A. 171, 181, 40 U. S. App. 257, 276, 34 L. R. A. 518, 525, this court announced its conclusion in these words:

"A city has two classes of powers,—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, *quasi* private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. Dill. Mun. Corp. (3d Ed.) § 66, and cases cited in the note; *Safety Insulated Wire & Cable Co. v. City of Baltimore*, 13 C. C. A. 375, 377, 378, 66 Fed. 140, 143, 144; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453, 468, 469; *Com. v. City of Philadelphia*, 132 Pa. St. 288, 19 Atl. 136; *New Orleans Gaslight Co. v. City of New Orleans*, 42 La. Ann. 188, 192, 7 South. 559, 560; *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 3 Wash. St. 316, 325, 28 Pac. 516, 519, 14 L. R. A. 669; *Wagner v. City of Rock Island*, 146, Ill. 189, 154, 155, 34 N. E. 545, 548, 549, 21 L. R. A. 519; *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 126, 31 N. E. 573, 577, 16 L. R. A. 485; *City of Indianapolis v. Indianapolis Gaslight & Coke Co.*, 66 Ind. 396, 403; *Read v. Atlantic City*, 49 N. J. Law, 558, 562, 9 Atl. 759. In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Corp. § 27; *City of Cincinnati v. Cameron*, 33 Ohio St. 336, 367; *Safety Insulated Wire & Cable Co. v. City of Baltimore*, *supra*, and cases cited under it."

The purpose of the city in making the contract of September 8, 1898, was to enlarge its waterworks, to increase its supply of water, and to furnish itself and its inhabitants with electric light. In contracting for these purposes the city was exercising its proprietary or business powers. It is controlled by the same rules that govern a private corporation, and its contract bound its successive sets of officers.

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See (1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

2.)
The next proposition which counsel for the city seek to maintain is that the water system of the city and the water which flows through it are held in trust by the municipality for the suppression of fires, for the domestic use of its inhabitants, and for other customary municipal purposes; and that the city council has no power to divert them to the generation of electricity for private use, or to any such purposes. Before entering upon the consideration of this position, let us see what the power of the city is in regard to the establishment and management of its water system, and what, under the facts of this case, this contention really is. The statutes of Colorado provide that the city councils of cities in that state shall have power to manage and control all their property (2 Mills' Ann. St. § 4492); to erect waterworks on a favorable vote of their electors (2 Mills' Ann. St. § 4403, par. 67); "to construct or authorize the construction of such waterworks, without their limits, and for the purpose of maintaining and protecting the same from injury and the water from pollution, their jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, trenches, pipes and drains, used in and necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken, for five miles above the point from which it is taken; and to enact all ordinances and regulations necessary to carry the power herein conferred into effect" (Id. par. 68); to construct reservoirs in public places in the city or beyond the limits thereof for the purpose of supplying the same with water; to provide proper conducting pipes to regulate the distribution of water for irrigation and other purposes (Id. par. 72). From these provisions of the statutes it will be seen that the city council of the appellee had plenary authority to manage and control the water system and all the property of the city, and to distribute and apply its water not only to ordinary municipal uses, but to "irrigation and other purposes." These were the powers of the council in this regard. Now, what was the state of facts when the ordinance of September, 1898, was passed? The city was not then engaged in initiating and constructing a system of waterworks. That had already been done. A system extending from watersheds on Pike's Peak, 19 miles distant, and 6,000 feet above the level of the sea, had been constructed and operated for years. The city had outgrown this system, and a contract had been made three years before for the construction of a tunnel to enlarge it, and to increase its supply of water. The contractors had exhausted their means and their credit, and the tunnel still lacked an expenditure of \$100,000 to complete it. This was the state of the facts. No one questions the power of the council of this city to contract for this tunnel, and to agree to pay for it in the money of the city. No one questions its power to procure electric lights, conduits, and poles to carry its telegraph and telephone wires, and to pay for them with the funds of the city. Its authority to do these things is so plain and full that it cannot be denied. Now, what did the city do, and what is the actual contention of its counsel

here? The price agreed upon by the contract of 1895 for the completion of the tunnel was not compensatory. It would not pay for the work necessary to be done. The contractors could not complete it without other compensation. Thereupon the city did this: It procured the completion of the tunnel, the right to use the conduits and poles of Jackson, his associates and assigns, to carry its wires, electric lights for its public buildings, and electric power to the extent of 50 horse power, without the payment of an additional dollar of the city's money, in consideration of a permit or license which it gave to the grantees in the September ordinance of the right to use the idle water power that existed and was running to waste in its water system. Now, what is the real contention of the counsel for the city here? It is that, while the city council might lawfully have contracted for these public utilities, and have taxed its constituents, and have paid out their money to obtain them, it had no authority to procure them for and to pay for them with the idle water power that existed in the water system of the city, without the expenditure of a dollar of the money of the citizens. It is, in fact, that municipal corporations hold all that part of public utilities which they cannot apply to customary municipal uses in trust to waste to the loss of their *cestuis que trustent*, and not in trust to use for their benefit. This proposition, when reduced to its last analysis, finds no support in reason or authority. It is true, as counsel for the city assert, that the water, the water system, and the other public utilities of a municipality are held by it and by its officers in trust for its citizens, and for the public; that neither the city nor its officers can renounce this trust, disable themselves from performing their public duties, or so divert or impair these utilities that they are rendered inadequate to the complete performance of the trust under which they are held. *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, 317, 2 C. C. A. 174, 281, 10 U. S. App. 98, 175, and cases there cited. But it is equally true that municipalities and their officers have the power, and it is their duty, to apply the surplus power and use of all public utilities under their control for the benefit of their cities and citizens, provided, always, that such application does not materially impair the usefulness of these facilities for the purposes for which they were primarily created. *Union Pac. Ry. Co. v. Chicago R. I. & P. Ry. Co.*, 51 Fed. 309, 321, 2 C. C. A. 174, 284, 10 U. S. App. 98, 180; *City of St. Louis v. The Maggie P. (C. C.)*, 25 Fed. 202; *State v. City of Eau Claire*, 40 Wis. 533; *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; *Bell v. City of Platteville*, 71 Wis. 139, 36 N. W. 831; *French v. Inhabitants of Quincy*, 3 Allen, 9; *Worden v. City of New Bedford*, 131 Mass. 23; *Camden v. Camden Village Corp.*, 77 Me. 530, 537, 1 Atl. 689; *Brown v. Winnisimmet Co.*, 11 Allen, 326, 334; *Midland Ry. Co. v. Great Western Ry. Co.*, 8 Ch. App. 841, 851; *Simpson v. Hotel Co.*, 8 H. L. Cas. 712; *Hendee v. Pinkerton*, 96 Mass. 881, 886. This question was presented to this court and exhaustively argued by able counsel in *Union*

Use of
Surplus

Pac. Ry. Co. v. Chicago R. I. & P. Ry. Co., *supra*. In that case the Union Pacific Railway Company had leased to another company for 999 years the joint use of its bridge across the Missouri river and of its terminal facilities of Omaha, together with about seven miles of its track, and it was contended that this lease was beyond the powers of the corporation, and void, because it was a diversion of the use of its railroad facilities from the public purposes for which the railroad corporation held them. The contract was, however, sustained, because it appeared that the use leased was a surplus use remaining after the Union Pacific Railway Company had retained for itself sufficient facilities to perform all its public functions and to discharge all its public duties. This court held, after careful consideration, and its decision was subsequently affirmed by the supreme court (*Union Pac. Ry. Co. v. Chicago R. I. & P. Ry. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265), that, if a corporation necessarily acquires for the conduct of its corporate business facilities whose entire capacity is not needed for its corporate use, it is not required to hold them in idleness, but it has the power, and it is its duty, alike to its stockholders and the public, to lease or otherwise apply the surplus use for their benefit. In *State v. City of Eau Claire*, 40 Wis. 538, and *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828, the supreme court of Wisconsin held that, where a city had legislative authority to erect a dam for the purpose of waterworks for the city, it might lawfully lease for private purposes any excess of water not required for its waterworks. This is a just and reasonable rule. It is a rule inconsistent with no principle of law or of equity, and in accord with that common sense and common business practice which recognize as a public good the growth of two blades of grass where but one grew before, and the conversion of waste to use. The case in hand falls far within the rule. By the contract of September, 1898, the city renounced no trust that had been imposed upon it. It disabled itself from the discharge of no duty. It in no way impaired the usefulness of the water or of the water system of the city for the public purposes for which it was constructed and maintained. On the other hand, that contract expressly provided that the water diverted by the grantees under it should be returned to the water system of the city unimpaired, without pollution or diminution of its flow, and that the grantees should do nothing under it which should interfere in any way with the successful operation of the waterworks of the city. Every use of those waterworks and of the water requisite to the discharge of the trust under which they were held for the usual municipal purposes was retained by the city unimpaired, while the idle power therein which was running to waste was wisely utilized, not for private use, but for the public purpose of enlarging the waterworks of the city, of increasing its supply of water, of procuring conduits and poles to carry its wires, and of obtaining electric light and power for its public buildings and its streets. The ordinance and the contract, therefore, were not void on the ground

that the water system and the water were held by the city in trust to extinguish fires, to distribute to its inhabitants for domestic uses, and for other municipal purposes, and on the ground that the municipality had no power to divert them to generate electricity for private use, because every use of the water and of the waterworks for which they were held in trust was expressly retained by the city unimpaired, because the grant in the ordinance was made for public purposes, and not for private use, and because that grant wisely utilized an idle water power for the benefit of the city and its inhabitants, without impairing the uses for which the water system was constructed and maintained.

BIDDEFORD v. YATES. 129

1908. 104 Me. 506.

SPEAR, J. This is an action of trespass involving the validity of a lease of the plaintiff to the defendant. There is no material dispute upon the facts. The locus in quo is the opera house, so called, embracing the hall in the city building and used for the purpose of giving plays, operas, etc., together with all the rooms and appurtenances belonging to and connected with the hall. On May 24, 1904, the plaintiff was the owner of the hall and appurtenances. On the same day the city council by its committee on public property made and delivered to the defendant an instrument, purporting to be a lease of the hall, expiring June first, 1907. On February 20, 1907, another city council by the same committee made a second instrument purporting to be a lease of the same hall to take effect, in futuro, at the expiration of the first lease, to wit: June 1, 1907, for a term of three years from the latter date. Between February 20, 1907, the date of the second lease, and June first, 1907, when it was to take effect, the term of office of the city officials, under whom this lease was made, had expired, and on the third Monday of March, a new city government had been inaugurated.

On the 10th day of June, the city council passed the following order: "Ordered, that the city solicitor be, and hereby is, authorized to obtain possession of the opera house and to adopt any proceedings that he may deem necessary therefor, including the institution and prosecution of any action at law or equity."

On the 23rd day of August, 1907, the city solicitor, whose official capacity is admitted, took physical possession of the leased premises without the knowledge or consent of the lessee, for the express purpose of excluding him therefrom, and notified the defendant of his assumption of possession and the purpose thereof and to abstain from any interference therewith. On the 24th day of August, Yates, the lessee, demanded of the city solicitor permission to enter, without being obliged to break in, claiming a right of occupancy under the instrument

purporting to be a lease dated Feb. 20, 1907. Being refused admission, he forcibly entered, and took possession of the hall.

This was the only public hall owned by the city of Biddeford from May 1, 1904, to the date of the plaintiff's writ. The charter of the city of Biddeford contains the following clause: "The city council shall have the care and superintendence of city buildings and the custody and management of all such property, with power to let or sell what may be legally let or sold." Under the city charter admitted to have been duly accepted, authorizing the establishment of by-laws and ordinances for the government of the city, was promulgated in 1887 the following ordinance:

"Chapter 15, City Building. Sec. 1. The committee on public property shall have the care and custody of such building and its appurtenances, and all the alterations and repairs thereof. Sec. 2. The said committee are authorized to lease any part of said building not already under lease or appropriated to any of the branches of the city government for any period not exceeding the term of three years, and upon such term and conditions as they may deem expedient, subject, however, to the approval of the mayor and aldermen."

During the period covering both the first and the second alleged lease, the following joint rule was passed both by the city council of 1904 and that of 1907: "Rule 1. At the commencement of the municipal year the following joint standing committees shall be appointed by the mayor unless otherwise ordered by the respective boards, namely: Committee on public property . . . to consist of the mayor, one alderman and three members of the common council." A committee thus appointed negotiated the terms and executed the leases above referred to, both of which were approved by the mayor and a majority of the aldermen of the city. At the time the above leases were executed and delivered to Yates, that part of the city building known as the opera house was not appropriated to the use of any of the branches of the city government nor leased to any other person. The defendant fulfilled all the stipulations and conditions contained in the first lease. He had also complied with all the requirements of the second lease so far forth as he could, the city having refused to accept payment of rent and having notified the defendant that it would not in the future accept rent.

In addition to the admitted facts, the plaintiff claims that the second lease was made to usurp the powers of the administration then about to be elected and was given for a grossly inadequate consideration, and was thereby fraudulent. As the evidence does not sustain the allegation of fraud, the political aspect of the case disappears and we feel authorized to consider it only upon the admitted facts.

These in our opinion involve simply a question of power on the part of the city government.

- 1st. Could the city council itself authorize a lease of this property?
- 2nd. If so, could it delegate its powers to a committee to effectuate its purpose?

3rd. If yes, could the city council execute and deliver a lease under one city government to take effect, in futuro, under another?

Plaintiff admits the authority of the city government to lease the opera house, if of that species of city property that "may be legally let." But the city claims that the property covered by the second lease was "already under lease" and therefore within the exception of the ordinance, ch. 15, sec. 2. We think this position untenable. The second lease did not take effect until after the expiration of the term of the first one, and therefore cannot be said, in the sense in which the ordinance should be construed, to cover property, "already under lease." The interpretation of this phrase as claimed by the plaintiff would prevent the city from renewing a lease even a day before it expired. Such construction is contrary to all business methods and should not be established unless the language of the ordinance expressly requires it. The phraseology does not require it, but rather its usual and ordinary meaning, the one naturally suggested is, that the city should not execute two leases covering the same property for the same period of time. If the ordinance was intended to mean any more than this, it could easily have been made to say so, and if the construction claimed by the plaintiff had been in the mind of the legislature, it would have said so. It would never have left so important and unusual a provision, if intended to mean what the plaintiff claims, to be established by the uncertain interpretation permissible by the language employed.

Again the plaintiff contends that the premises let were public property, and could be rented only for public purposes, *Thorndike v. Camden*, 82 Maine, 39, *Goss v. Greenleaf*, 98 Maine, 436, and could be used for private purposes when not needed for public use, *Reynolds v. Waterville*, 92 Maine, dissenting opinion, page 317, and cases cited, and that under the leases in question the public use was made subservient to the private use. The agreed statement does not furnish any evidence of this contention, and so far as it goes, tends to show the reverse, it being admitted that the part of the city building known as the opera house, was not appropriated to the use of the city, and was reserved for memorial day, for the graduation exercises of the high school and necessary rehearsals therefor. The lessee was also required to let the hall, when not otherwise engaged in good faith, on the payment of running expenses for any public purpose upon application by the mayor, to any political body in the city at the request of the chairman of respective city committees, and to any established church in the city one day in each year to each such church. It appears that the opera house was subject to all these public uses free from any charge except the running expenses. These would have to be paid by some one, whether the city or the lessee was in control of the hall.

Our conclusion is that under section 4 of the charter which provides that the city council shall have "power to let or sell what may be legally let or sold," the first question should be answered in the affirma-

tive. We need not look beyond the city charter for authority to exercise this power on the part of the city as the charter is an act of the legislature and the section under consideration violates no provision of the constitution.

Whether the city government could delegate authority to a committee to let city property, depends entirely upon whether the delegation of such authority invested the committee with judicial or ministerial powers. "Functions which are purely executive, administrative or ministerial may be delegated to a committee. It is only such functions as are governmental, legislative or discretionary which cannot be delegated." A. & E. Encyc. of Law, Vol. 20, page 1218. These duties may be simplified by classing them under the head of ministerial and judicial functions as the act of every public official is either ministerial or judicial. *People v. Jerome*, 78 N. Y. Supp. 306. A purely ministerial duty is one as to which nothing is left to discretion. Judicial acts involve the exercise of discretionary power or judgment. Judicial acts are not confined to the jurisdiction of judges.

No question is raised as to the authority of the city council to appoint a committee on public property, and none could be raised, provided they invested the committee with ministerial powers only. Hence the issue here presented is: Did the ordinances, under which the committee acted, confer upon it ministerial authority only, or did it go further and clothe it with judicial powers?

To determine this issue, let us analyze the ordinance in question and discover just what powers it did confer upon the committee on public property. The legislature in granting the charter invested the committee with power to let "what may be legally let." The ordinance authorized the committee to lease any part of the building not already under lease or appropriated to the use of the city for any period not exceeding three years. It has already been determined that the lease embraced only what might be "legally let." So far the authority of the ordinance comports with that of the charter. The substance of the act conferred by the charter was the right to lease. The appointment of a committee by an ordinance was a proper and convenient way to carry out the details of the right conferred. Without any ordinance at all, the city council could have let the hall. The charter so provided. The ordinance therefore was made, as all ordinances are, for the purpose of prescribing a permanent method of transacting the particular business involved. Therefore the language of the ordinance that the committee may lease "upon such terms and conditions as they may deem expedient" involves simply those ministerial acts necessary to perform the act of leasing. In the light of the context which determines that a lease may be made, what shall be let and the term of the lease, this clause seems to have been used for the purpose of authorizing the committee to negotiate the various details which might arise in connection with the transaction involved. Those things which it would be impossible for an ordinance to prescribe in detail were left to the action

of the committee. An illustration of this point is found in the present case where the specifications submitted by the lessee, prescribing various things which he stipulated to do, embrace three full pages, and from twenty to thirty different items.

This interpretation seems to be fully borne out in *Gillett v. Logan County et al.*, 67 Ill. 256. In this case the Board of Supervisors of the county authorized three of their own number, who had been appointed for the purpose of employing counsel to defend the interest of the county, "to use their discretion in employing such further agents or assistants as might, to them, seem expedient, for the purpose of defending the interest of the county . . . the committee being empowered to contract with such agents or assistants." The court say: "The first ground relied on in support of the bill is, that the foregoing resolution was illegal; the Board of Supervisors had no right to delegate to a committee such power as was given by the resolution," and in answer to this contention hold, "That the duties of a committee, although they might include the making of contracts, were merely ministerial, which they might properly be appointed to perform as recognized in *City of Alton v. Mulledy*, 21 Ill. 76; *McClaghry v. Hancock County*, 46 Ill. 356." In speaking of the impracticability of the Board of County Commissioners sitting in session to carry out all the details of a contract, which applies with equal force to the action of a city council in a similar case, the court further add: "The position taken by the appellant involves the absurd consequence that this Board of Supervisors, composed of nineteen members, should have been kept in constant session during the progress of this protracted investigation, in order that they might, from day to day, as required, make bargains, as a body, for each item of service and expense incurred. It was unnecessary; they might act by a committee appointed, as in the present mode."

The right of a city council to delegate its authority to a committee to perform acts which the council itself might legally do, was raised in *Hitchcock v. Galveston*, 96 U. S. 341, in which the court hold: "If the city council had lawful authority to contract the sidewalks, involved in it was the right to direct the mayor, and the chairman on streets and alleys, to make a contract on behalf of the city for doing the work. We spend no time in vindicating this proposition. It is true, the city council could not delegate all the power conferred upon it by the legislature, but like every other corporation, it could do its ministerial work by agents. Nothing more was done in this case."

This case also clearly determines that when a city council is authorized to make a contract, it can appoint a committee to negotiate the details. To the same effect is *Han. & St. Jo. R. R. Co. v. Marion County*, 36 Mo. 296, in which it was contended by the defendant that the county court was the only agent authorized by law to issue instruments in payment to subscribers for stock and that the instruments were not issued by the court, but by certain Justices appointed by the

court, and that their act was not binding on the defendant; that is, that the county court could not delegate its authority to the persons named. But the appellate court held otherwise, saying: "When the legislature empowered the county court to subscribe stock to the railroad company, it also clothed it with the means which might be convenient for making its action effectual. The substantive act was the taking of the stock."

To the same effect also is *Collins v. Holyoke*, 146 Mass. 298, where the court say: "It is true as contended by the petitioner that the mayor and aldermen could not delegate the authority given them by the public statutes, Ch. 50, sec. 1, to lay and make common sewers. But no suggestion is made that the sewer was not legally laid, and it is only objected that it was 'built under the direction and supervision of a committee composed of four members of the common council and three aldermen.' But this was done by the order of the mayor and aldermen. The statute which gave them authority to make the sewers did not preclude them from employing agents to supervise and direct the work." Hence it appears from this opinion that the substance of the thing which could not be delegated was the laying out of the sewer, and not the details involved in its construction, some of which must necessarily have embraced the negotiating of contracts.

3) The third objection raised by the plaintiff to the legality of the lease is based upon the fact that one city council made the lease to take effect, in futuro, under another.

But it must be observed that, while the personnel may have been different, the city council under which the lease took effect was precisely the same tribunal under the charter and the ordinances that executed the lease. The plaintiff, however, contends that the fact of an election between the execution of the lease and the beginning of its term, involving a possible change in the personnel of the new city council, made the attempt to execute a lease, to thus take effect, an invasion of the prerogatives of the new board. But we are unable to discover any substantial reason in support of this contention. While the personnel of a city government may change, the tribunal itself is a continuous body. As was said in *Collins v. Holyoke*, supra: "The membership of the defendant board is not the same as when the assessment in question was made. But while its members change from time to time, the Board itself as a tribunal is continuously the same." See also *Fairbanks v. Fitchburg*, 132 Mass. 42. While one city government composed of one set of individuals might, upon a given question, do precisely the reverse of another city government, composed of a different set of individuals, yet, what the individuals of different city governments might do, can in no way affect the right of a tribunal as a city government to act upon any measure properly before it. What the individuals may do, as a matter of opinion, is one thing, but what the tribunal, a perpetual body, is empowered to do as a matter of authority, is quite another thing. It appears to us that the logic of the plaintiff's contention tends to limit a city council to action with respect to such

matters only as are to go into effect under its own administration. Such limitation would segregate a municipal government from all other corporations and business institutions, in the methods employed for the transaction of business, and might it seems to us prove highly detrimental. A municipal government represented by its city council should be regarded as a business institution with reference to those transactions or matters permitted by the terms of its charter. When not limited to a prescribed method it should be permitted to act with the same business foresight that is accorded to other business institutions. A corporation or individual dealing in the letting of property might find it of the highest importance to make a lease today to take effect months or even years hence. They might find it equally detrimental to be limited in their power to thus anticipate the future. This idea is so apparent as a business proposition as to become self evident.

We have seen that the city council itself was empowered to make the lease in question and could delegate authority to a committee to negotiate its terms. We are therefore of the opinion that a lease thus legally executed is not void from the fact that it is made by one city council to take effect, in futuro, under another.

Judgment for the defendant.

CHAPTER V.

LIABILITY.

SECTION 1. — *Liability on Contracts.*

MARSH v. FULTON COUNTY.

1870. 10 Wallace (U. S.), 676.¹

ERROR to U. S. Circuit Court for Southern District of Illinois.

Suit on fifteen bonds, purporting to be the obligations of the County of Fulton to the Central Division of the Mississippi and Wabash R. R. Co., or bearer. The Mississippi and Wabash R. R. Co. was incorporated by the legislature of Illinois in February, 1853. At an election held in November, 1853, a majority of the voters of Fulton County voted that the county should subscribe \$75,000 to the capital stock of the aforesaid company, payable in the bonds of the county; such bonds not to be issued until certain conditions were complied with. (The material portions of the Illinois statute authorizing county subscriptions are stated in the opinion of the court.)

In February, 1857, an act was passed by the legislature of Illinois amending the charter of the Mississippi and Wabash Company, by which the line of the railroad was divided into three divisions, designated the Western, the Central, and the Eastern divisions, and each division was placed under the management and control of a board of three commissioners, to be elected by the stockholders of the division, and to be invested with all the powers of the original board of directors of the company over the road in their division.

In April, 1857, the stockholders within the Central Division elected commissioners of the division, who thenceforth, until December, 1868, exercised all the powers conferred by this amendatory act.

On the books of the Central Division thus organized, the clerk of the County Court of Fulton County, acting as clerk of the board of supervisors of that county, made the subscription of \$75,000 in the name of the county, and in September following issued to this division the fifteen bonds which are in suit in this cause.

[The bonds contain no recitals as to the statute under which they were issued, or as to the prior votes or proceedings of the county or its officers.]

There were various acts of the board of supervisors of Fulton County done after the issue of these bonds, which tended to show

¹ Statement abridged. — Ed.

County voted -- to
subscribe to R.R.
stock with bonds.

R.R. divided into
3 divisions
after election.

County Court of Fulton County

14

130

that the board recognized them and considered the county bound for them.

Defendants pleaded the general issue, and judgment was rendered in their favor.

O. H. Browning and O. C. Skinner, for plaintiff in error, relied largely on the fact which they asserted, and which they relied on as not disproved, that the bonds were in the hands of innocent holders for value; and that whether regularly issued originally or not, they had been ratified by the county in so many different ways, so advisedly and so unequivocally, that irregularity could not now be set up.

S. Corning Judd, contra.

Mr. Justice FIELD delivered the opinion of the court.

The questions presented for our consideration are, *first*, whether the bonds issued by the clerk of the County Court of Fulton County to the Central Division of the Mississippi and Wabash Railroad Company were, at the time of their issue, valid obligations of the County of Fulton; and, *second*, if not thus valid, whether they have become obligatory upon the county by any subsequent ratification.

Were they valid when issued? The answer depends upon the law of Illinois then in force. The clerk of the County Court possessed no general authority to bind the county. He was a mere ministerial officer of the board of supervisors; and that body was equally destitute of authority in this particular, except as the law of Illinois gave it. That law authorized any county of the State, and, of course, its supervisors, who exercised the powers of the county, to subscribe stock to any railroad company in a sum not exceeding one hundred thousand dollars, and to pay for such subscription in its bonds, provided such subscription was previously sanctioned by a majority of the qualified voters of the county at an election called for the expression of their wishes on the subject, and it prohibited any subscription or the issue of any bonds for such subscription without such previous sanction. "No subscription shall be made or purchase bond issued by any county," says the law, "unless a majority of the qualified voters of such county . . . shall vote for the same." And the law further requires that the notices calling for the election "shall specify the company in which stock is proposed to be subscribed."

These provisions furnish the answer to the first question presented. The only subscription authorized by the voters of Fulton County was that to the Mississippi and Wabash Railroad Company, and one to the Petersburg and Springfield Company. The Central Division of the Mississippi and Wabash Railroad Company was a different corporation from the original company. It has been so held by the Supreme Court of Illinois in a case involving the consideration of a portion of the bonds in suit and the remaining sixty thousand dollars of bonds of the original subscription.

The amendatory act of 1857 dividing the road into three divisions, and subjecting each division to the control and management of a different board, clothed with all the powers of the original board, so far as the division was concerned, worked a fundamental change in the character of the original corporation, and created three distinct corporations in its place. A subscription to a company whose charter provided for a continuous line of railroad of two hundred and thirty miles, across the entire State, was voted by the electors of Fulton County; not a subscription to a company whose line of road was less than sixty miles in extent, and which, disconnected from the other portions of the original line, would be of comparatively little value.

But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact we do not perceive how it could affect the liability of the County of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed — where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd Acceptances*.¹ In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: "In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

It is also contended that if the bonds in suit were issued without authority their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent

¹ 7 Wallace. 676.

since would for
1 RR. plan for
that voted for

II
Bonds invalid even
in hands of C.P.

III
The power to

Holder is to
ascertain whether
law followed

as in commercial
paper, alleged to
have been issued
under a delegated
authority

III
Supervisors can't
ratify

to do the act existed originally. ~~It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified.~~ The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. ~~They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization.~~ It would be absurd to say that they could, without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts, when they were directly in terms prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition.¹

We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way.

We perceive no error in the record, and the judgment of the Circuit Court must, therefore, be

Affirmed.

TOWN OF COLOMA v. EAVES. 131

1875. 92 U. S. 484.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Assumpsit brought by the plaintiff below to recover the amount due on the coupons attached to certain bonds, purporting to have been issued by the town of Coloma, through its proper officers, to the Chicago and Rock River Railroad Company, in payment of a subscription of \$50,000 by the town to said company. The form of the bond is as follows:—

UNITED STATES OF AMERICA.

[\$1,000.

"COUNTY OF WHITESIDE,

"State of Illinois, Town of Coloma:—

"Know all men by these presents, That the township of Coloma, in the county of Whiteside, and State of Illinois, acknowledges itself to owe and be indebted to the Chicago and Rock River Railroad

¹ McCracken v. City of San Francisco, 16 California, 624.

Company, or bearer, in the sum of \$1,000, lawful money of the United States; which sum the said town of Coloma promises to pay to the Chicago and Rock River Railroad Company, or the bearer hereof, on the first day of July, 1881, at the office of the treasurer of the county of Whiteside aforesaid, in the State of Illinois, on the presentation of this bond, with interest thereon from the first day of January, 1872, at the rate of ten per centum per annum, payable annually at the office of the treasurer of the county of Whiteside aforesaid, on the presentation and surrender of the annexed coupons.

" [U. S. \$5 revenue-stamp.]

" This bond is issued under and by virtue of a law of the State of Illinois entitled 'An Act to incorporate the Chicago and Rock River Railroad Company,' approved March 24, 1869, and in accordance with a vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law, and under a law of the State of Illinois entitled 'An Act to fund and provide for the paying of the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869; and, when this bond is registered in the State auditor's office of the State of Illinois, the principal and interest will be paid by the State treasurer, as provided by said last-mentioned law.

" In witness whereof, the supervisor and town-clerk of said town have hereunto set their hands and seals this first day of January, A.D. 1872.

"(Signed)

M. R. ADAMS, *Supervisor.*

[SEAL.]

"(Signed)

J. D. DAVIS, *Town-Clerk.*

[SEAL.]"

Recovery was resisted by the town, mainly upon the alleged ground of a want of power in the officers of the town to issue the bonds, because the legal voters of the town had not been notified to vote upon the question of the town's making the subscription in question.

On the trial of the case, judgment was rendered for the plaintiff for the amount of the coupons, and interest after they were due.

C. M. Osborn for plaintiff.

J. Grant, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

It appears by the record that the plaintiff is a bona fide holder and owner of the coupons upon which the suit is founded, having obtained them before they were due, and for a valuable consideration paid. The bonds to which the coupons were attached were given in payment of a subscription of \$50,000 to the capital stock of the Chicago and Rock River Railroad Company, for which the town received in return certificates of five hundred shares, of \$100 each, in the stock of the company. That stock the town retains, but it resists the payment of the bonds, and of the coupons attached to them, alleging that they were issued without lawful authority.

Saying nothing at present of the dishonesty of such a defence while the consideration for which the bonds were given is retained, we come at once to the question, whether authority was shown for the stock subscription, and for the consequent issue of the bonds. At the outset, it is to be observed that the question is not between the town and its own agents: it is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority.

By an act of the legislature of Illinois, the Chicago and Rock River Railroad Company was incorporated with power to build and operate a railroad from Rock Falls on Rock River to Chicago, a distance of about one hundred and thirty miles. The tenth section of the act enacted, that, "to aid in the construction of said road, any incorporated city, town, or township, organized under the township organization laws of the State, along or near the route of said road, might subscribe to the capital stock of said company." That the town of Coloma was one of the municipal divisions empowered by this section to subscribe fully appears, and also that the railroad was built into the town before the bonds were issued. But it is upon the eleventh section of the act that the defendant relies. That section is as follows:—

"No such subscription shall be made until the question has been submitted to the legal voters of said city, town, or township, in which the subscription is proposed to be made. And the clerk of such city, town, or township, is hereby required, upon presentation of a petition signed by at least ten citizens who are legal voters and tax-payers in such city, town, or township, stating the amount proposed to be subscribed, to post up notices in three public places in each town or township; which notices shall be posted not less than thirty days prior to holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township, for the purpose of voting for or against such subscriptions. If it shall appear that a majority of all the legal voters of such city, town, or township, voting at such election, have voted 'for subscription,' it shall be the duty of the president of the board of trustees, or other executive officer of such town, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such city, town, or township, the amount so voted to be subscribed, and to receive from such company the proper certificates therefor. He shall also execute to said company, in the name of such city, town, or township, bonds bearing interest at ten per cent per annum, which bonds shall run for a term of not more than twenty years, and the interest on the same shall be made payable annually; and which said bonds shall be signed by such president or supervisor or other executive officer, and

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be attested by the clerk of the city, town, or township, in whose name the bonds are issued."

Sect. 12 provides, "It shall be the duty of the clerk of any such city, town, or township, in which a vote shall be given in favor of subscriptions, within ten days thereafter, to transmit to the county-clerk of their counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid."

Most of these provisions are merely directory. But conceding, as we do, that the authority to make the subscription was, by the eleventh section of the act, made dependent upon the result of the submission of the question, whether the town would subscribe, to a popular vote of the township, and upon the approval of the subscription by a majority of the legal voters of the town voting at the election, a preliminary inquiry must be, How is it to be ascertained whether the directions have been followed? whether there has been any popular vote, or whether a majority of the legal voters present at the election did, in fact, vote in favor of a subscription? Is the ascertainment of these things to be before the subscription is made, and before the bonds are issued? or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the statute. Its avowed purpose was to aid the building of the railroad by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. It must have been considered, that, the higher the price obtained for them, the more advantageous would it be for the company, and for the cities and towns which gave the bonds in exchange for capital stock. Every thing that tended to depress the market-value was adverse to the object the legislature had in view. It could not have been overlooked that their market-value would be disastrously affected if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued, — contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the legislature had in view; namely, aid in the construction of the road. Such an interpretation ought not to be given to the statute, if it can reasonably be avoided; and we think it may be avoided.

At some time or other, it is to be ascertained whether the directions of the act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for

all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town-clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met. This presumption is strengthened by the provisions of the twelfth section, which make it the duty of the clerk to transmit to the county-clerk a transcript or statement, verified by his oath, of the vote given, with other particulars, in case a subscription has been voted. How is he to perform this duty if he is not to conduct the election, and to determine what the voters have decided? If, therefore, there could be any obligation resting on persons proposing to purchase the bonds purporting to be issued under such legislative authority, and in accordance with a popular vote, to inquire whether the provisions of the statute had been followed, or whether the conditions precedent to their lawful issue had been complied with, the inquiry must be addressed to the town-clerk or executive officer of the municipality, — to the very person whose duty it was to ascertain and decide what were the facts. The more the statute is examined, the more evident does this become. The eleventh section (quoted above) declared, that if it should appear that a majority of the legal voters of the city, town, or township, voting, had voted "for subscription," the executive officer and clerk should subscribe and execute bonds. "If it should appear," said the act. Appear when? Why, plainly, before the subscription was made and the bonds were executed; not afterwards. Appear to whom? In regard to this, there can be no doubt. Manifestly not to a court, after the bonds have been put on the market and sold, and when payment is called for, but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds if the vote appeared to them to justify such action under the law. These persons were the supervisor and town-clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent. It certainly devolved upon some person or persons to decide this preliminary question; and there can be no doubt who was intended by the law to be the arbiter. In *Commissioners v. Nichols*, 14 Ohio St. 260, it was said that "a statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock-subscriptions, or otherwise, to complete a certain railroad, and imposing upon them the duty of delivering the bonds when such provision had been made, without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners; and, if delivered improvidently, the bonds will not be invalidated."

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re: duty of...

If any other town...
had been made...
these go.

In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed were those whose duty it was also to issue the bonds in the event of such performance. The statute required the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the clerk signed them; and they were registered in the office of the auditor of the State, in accordance with an act, requiring that, precedent to their registration, the supervisor must certify under oath to the auditor that all the preliminary conditions to their issue required by the law had been complied with. On each bond the auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they "are issued under and by virtue of the act incorporating the railroad company," approved March 24, 1869, "and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law." After all this, it is not an open question, as between a bona fide holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township-officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond those a bona fide purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others, — to those most competent to decide it, — and which the purchaser is, in general, in no condition to decide for himself.

This we understand to be the settled doctrine of this court. Indeed, some of our decisions have gone farther. In the leading case of *Knox v. Aspinwall*, 21 How. 544, the decision was rested upon two grounds. One of them was that the mere issue of the bonds, containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with; and it was said that the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it.

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p. 64 to

This position was supported by reference to *The Royal British Bank v. Torquand*, 6 Ell. & Bl. 327, a case in the Exchequer Chamber, which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in *Knox v. Aspinwall* has been more than once reaffirmed in this court. It was in *Moran v. Miami County*, 2 Black, 732; in *Mercer County v. Hackett*, 1 Wall. 83; in *Supervisors v. Schenk*, 5 id. 784; and in *Mayor v. Muscatine*, 1 id. 384. It has never been overruled; and, whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox v. Aspinwall*. That, we think, has been so firmly seated in reason and authority, that it cannot be shaken. What it is has been well stated in sect. 419 of Dillon on Munic. Corp. After a review of the decisions of this court, the author remarks, "If, upon a true construction of the legislative enactment conferring the authority (viz., to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide, will, in favor of the bondholder for value, bind the corporation." This is a very cautious statement of the doctrine. It may be restated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal. In *Bissell v. Jeffersonville*, 24 How. 287, it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three-fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A

o Rule.

similar ruling was made in *Van Hostrop v. Madison City*, 1 Wall. 291, and in *Mercer County v. Hackett*, id. 83.

The same principle has recently been asserted in this court after very grave consideration, and it must be considered as settled. In *St. Joseph's Township v. Rogers*, 16 Wall. 644, it is stated thus:—

“Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all of these recitals were incorrect will not constitute a defence for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation condition, or qualification, which it is alleged was not fulfilled.”

There is nothing in the case of *Marsh v. Fulton*, 10 Wall. 675, to which we have been referred, at all inconsistent with the rule thus asserted. In that case, there were no recitals in the bonds; and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open.

What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown; and, even if it had been admissible, the effort to assimilate the case to *Marsh v. Fulton* would fail. There the subscription was for the stock of a different corporation from that for which the people had voted: here it was not.

Judgment affirmed.

MR. JUSTICE BRADLEY delivered the following concurring opinion:—

I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of *Knox County v. Aspinwall*; to wit, that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of tax-payers, before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute, the bonds, and if the bonds themselves contain a statement or recital that such vote has been given, then the bona fide purchaser of the bonds need go back no farther. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It

may be *prima facie* sufficient; but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject; and I do not think that the contrary has ever been decided by this court. There have been various *dicta* to the contrary; but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of *Lynde v. The County of Winnebago*, 16 Wall. 13. In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it was to ascertain these facts. On this ground, and this alone, I concur in the judgment of the court.

MR. JUSTICE MILLER, MR. JUSTICE DAVIS, and MR. JUSTICE FIELD, dissented.

MILLER, J., IN HUMBOLDT TOWNSHIP v. LONG. 132

1875. 92 U. S. 642, pp. 646-651.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE DAVIS and MR. JUSTICE FIELD, dissenting.

We have had argued and submitted to us, during the present term, some ten or twelve cases involving the validity of bonds issued in aid of railroads by counties and towns in different States.

They were reserved for decision until a late day in the term; and the opinions having been delivered in all of them within the last few weeks, I have waited for what I have thought proper to say by way of dissent to some of them until the last of these judgments are announced, as they have been to-day.

I understand these opinions to hold, that, when the constitution of the State, or an act of its legislature, imperatively forbids these municipalities to issue bonds in aid of railroads or other similar enterprises, all such bonds issued thereafter will be held void. But, if there exists any authority whatever to issue such bonds, no restrictions, limitations, or conditions imposed by the legislature in the exercise of that authority can be made effectual, if they be disregarded by the officers of those corporations.

That such is the necessary consequence of the decision just read, in the cases from the State of Kansas, is too obvious to need argument or illustration. That State had enacted a general law on the subject of subscriptions by counties and towns to aid in the construction of railroads, in which it was declared that no bonds should be issued on which the interest required an annual levy of a tax beyond one per cent of the value of the taxable property of the municipality which issued them.

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In the cases under consideration this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns, is given in these cases with exactness; but I do know that in some of the cases tried before me last summer in Kansas it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax-list of the year preceding the issue.

This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature.

It is therefore clear that, so long as this doctrine is upheld, it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity.

It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the States on that subject.

The result of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a State constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. It establishes that of all the class of agencies, public or private, whether acting as officers whose powers are created by statute or by other corporations or by individuals, and whether the subject-matter relates to duties imposed by the nation, or the State, or by private corporations, or by individuals, on this one class of agents, and in regard to the exercise of this one class of powers alone, must full, absolute, and uncontrollable authority be conferred on them, or none. In reference to municipal bonds alone, the law is, that no authority to issue them can be given which is capable of any effectual condition or limitation as to its exercise.

The power of taxation, which has repeatedly been stated by this court to be the most necessary of all legislative powers, and least capable of restriction, may by positive enactments be limited. If the constitution of a State should declare that no tax shall be levied exceeding a certain per cent of the value of the property taxed, any statute imposing a larger rate would be void as to the excess. If the legislature should say that no municipal corporation should assess a tax beyond a certain per cent, the courts would not hesitate to pronounce a levy in excess of that rate void.

But when the legislature undertakes to limit the power of creating a debt by these corporations, which will require a tax to pay it in excess of that rate of taxation, this court says there is no power to do this effectually. No such principle has ever been applied by this court, or by any other court, to a State, to the United States, to private corporations, or to individuals. I challenge the production of a case in which it has been so applied.

In the *Floyd Acceptance Cases*, 7 Wall. 666, in which the Secretary of War had accepted time-drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make any one dealing with the agent bound by the limitation, or that the agent's construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open and notorious, bind the corporation which he professes to represent.

The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers.

It is, that wherever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and especially and particularly if they make a *false recital* of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it.

This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood. But in the *Floyd Acceptance Cases* this court held, and it was necessary to hold so there, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed it could not be aided by giving the paper that form. In *County Bond Cases* it seems to be otherwise.

In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In *County Bond Cases*, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is still valid.

There is no reason, in the nature of the condition on which the power depends in these cases, why any purchaser should not take notice of its existence before he buys. The bonds in each case were issued at one time, as one act, of one date, and in payment of one subscription. All this was a matter of record in the town where it was done.

So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued is of record both in that

town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township-clerk or the county-clerk to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that, before buying these bonds, the purchaser must look to those matters on which their validity depended.

They are all public, all open, all accessible, — the statute, the ordinance for their issue, the latest assessment-roll. But in favor of a purchaser of municipal bonds all this is to be disregarded, and a debt contracted without authority, and in violation of express statute, is to be collected out of the property of the helpless man who owns any in that district.

I say helpless advisedly, because these are not *his* agents. They are the officers of the law, appointed or elected without his consent, acting contrary, perhaps, to his wishes.

Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who, manage the affairs of towns, counties, and villages, in creating debts which not they, but the property-owners, must pay.

The original case on which this ruling is based is *Knox County v. Aspinwall*, 21 How. 539. It has, I admit, been frequently cited and followed in this court since then, but the reasoning on which it was founded has never been examined or defended until now: it has simply been followed. The case of the *Town of Coloma v. Eaves*, 92 U. S. 484, is the first attempt to defend it on principle that has ever been made. How far it has been successful I will not undertake to say. Of one thing I feel very sure, that if the English judges who decided the case of *The Royal British Bank v. Turquand*, on the authority of which *Knox County v. Aspinwall* was based, were here to-day, they would be filled with astonishment at this result of their decision.

The bank in that case was not a corporation. It was a joint-stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money. This power depended in this particular case on a resolution of the company. The charter or deed of settlement gave the power, and, when it was exercised, the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient.

That was a private partnership. Its papers and records were not open to public inspection. The manager and directors were not officers of the law, whose powers were defined by statute, nor was the existence of the condition on which the power depended to be ascertained by the inspection of public and official records made and kept by officers of the law for that very purpose.

In all these material circumstances that case differed widely from those now before us.

It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market, they must pay them when they become due.

But it is another thing to say that when an officer created by the law exceeds the authority conferred upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue, and no power to prevent it.

This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market.

If one of two innocent persons must suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose, rather than the property-holder, who might not know any thing of the matter, or, if he did, had no power to prevent the wrong.

NORTHERN BANK OF TOLEDO v. PORTER TOWNSHIP TRUSTEES. 133

1884. 110 U. S. 608.¹

ERROR to U. S. Circuit Court for Northern District of Ohio. Verdict below for defendants.

This was an action upon bonds purporting to be issued by Porter Township in payment of a subscription to the stock of the Springfield, Mount Vernon, and Pittsburgh R. R. Co. By the charter of said company, granted March 21st, 1850, power was given to the county commissioners to subscribe for stock if authorized by vote of the electors; and, if the county commissioners should not be authorized by such a vote, then the township trustees were empowered to subscribe if authorized by vote of the qualified voters of the township.

Up to March 25th, 1851, neither Delaware County, nor Porter Township in Delaware County, had subscribed, or voted to subscribe to the stock of the railroad company.

By an act passed March 25th, 1851, county commissioners of the several counties, through or into which the Springfield and Mansfield Railroad shall be located, were authorized to cause the question of subscription provided for in the act of March 21st, 1850, "to be submitted to the qualified voters of their respective counties, at a special election, to be by them called for that purpose, at any time

¹ Statement abridged. Portions of opinion omitted. — Ed.

It provided, if
county not authorized
to subscribe
by an act of the
submitted to
township trustees.

thereafter, having first given twenty days' previous notice;" further, that "if the commissioners of any of the counties aforesaid shall not be authorized by the vote as aforesaid to subscribe to the capital stock of said company on behalf of their respective counties, then, and in that case, the question of subscription by township trustees provided for in the same act incorporating said railroad company shall be submitted to the people of the respective townships, at a special election, to be called as provided for in the first section of this act"—such elections to be conducted in all respects in the same manner provided for in the charter of the company, except as modified by the said act of March 25th, 1851.

County voted to
subscribe.

On the 15th day of April, 1851, the commissioners of Delaware County, Ohio, passed an order submitting to the voters of that county, at a special election to be held on the 17th day of June thereafter, a proposition to subscribe the sum of \$50,000 to the capital stock of the Springfield and Mansfield Railroad Company, a corporation created under the laws of that State, and whose name was subsequently changed to that of the Springfield, Mount Vernon and Pittsburgh Railroad Company. This proposition was approved by the electors, and subsequently, August 4th, 1851, the county commissioners made a subscription of the amount voted, payable in bonds of the county.

Township then
submitted to
subscribe.

After the vote in favor of a county subscription of \$50,000, and two days before the formal subscription in its behalf by the county commissioners, that is, on the 2d day of August, 1851, the trustees of Porter Township, in Delaware County, passed an order submitting to the voters of that township, at a special election to be held on the 30th day of August thereafter, a proposition for a subscription of not exceeding \$10,000 and not less than \$8,000 to the capital stock of the same company, payable in township bonds, upon the condition that the road should be permanently located and established through that township. The proposition was approved by the voters, and subsequently, on May 6th, 1853, township bonds for the amount voted with interest coupons attached were issued. They were made payable to the railroad company or its assignees, and were in the customary form of negotiable municipal bonds. Each one recited that it was "issued in part payment of a subscription of one hundred and sixty shares of \$50 each to the capital stock of the said Springfield, Mount Vernon and Pittsburgh Railroad Company, made by the said township of Porter in pursuance of the provisions of the several acts of the general assembly of the State of Ohio and of a vote of the qualified electors of said township of Porter taken in pursuance thereof."

Recitals

In behalf of the plaintiff in error, the present holder of the bonds, it is claimed that there was statutory authority for their issue, and

that, apart from any question of such authority, the township is estopped by their recitals, and by numerous payments of annual interest, from disputing its liability.

E. W. Kittredge, for plaintiff in error.

W. M. Ramsey, for defendant in error.

HARLAN, J.

The general assembly of Ohio, it must be presumed, knew at the passage of the act of March 25th, 1851, what particular counties and townships had then made subscriptions to the stock of this railroad company. That act was passed with reference to the situation as it actually was. When, therefore, upon the basis of non-authorization of the commissioners to make a county subscription, it was provided, in the act of March 25th, 1851, that "then, and in that case" townships might subscribe, it must have been intended that the authority of any township, which had not *then* acted, to subscribe should exist only where, after the passage of the latter act, a county subscription had been negatived either by a vote of the people or by the refusal or failure of the commissioners within a reasonable time to submit the question to a popular vote. If this be not so, then Porter Township would have been authorized in its discretion to vote on a proposition to subscribe either at the annual election in April, 1851, or at any special election thereafter held, notwithstanding the county may have previously made a subscription. But such we cannot suppose to be a correct interpretation of the statute. Consequently, from and after March 25th, 1851, it was apparent from the terms of the act of that date that Porter Township had no legal authority to make a subscription of stock, except in the contingency — which the township could not control, but of which it and all others were bound to take notice — that the commissioners had not been authorized to subscribe for the county. So far from that contingency ever arising, the commissioners (before the township election was called) had been authorized by popular vote to subscribe, and they did in fact subscribe, the sum of \$50,000. It cannot, therefore, be said that the commissioners were not authorized by a vote of the county to subscribe at the time Porter Township voted; consequently, the latter was without legal authority to make a subscription. This conclusion is satisfactory to our minds, and is, besides, sustained by the decision of the Supreme Court of Ohio in *Hopple v. Trustees of Brown Township in Delaware County*, 13 Ohio St. 311, reaffirmed in *Hopple v. Hipple*, 33 Ohio St. 116.

It is, however, contended, that by the settled doctrines of this court, the township is estopped by the recitals of the bonds in suit, to make its present defence. The bonds, upon their face, purport to have been issued "in pursuance of the provisions of the several acts of the general assembly of the State of Ohio, and of a vote of the qualified electors in said township of Porter, taken in pursuance

Township had
legal authority
to subscribe.

Recitals of
bonds in suit
purport to
show that

thereof." These recitals, counsel argue, import a compliance, in all respects, with the law, and, therefore, the township will not be allowed, against a *bona fide* holder for value, to say that the circumstances did not exist which authorized it to issue the bonds. It is not to be denied that there are general expressions in some former opinions which, apart from their special facts, would seem to afford support to this proposition in the general terms in which it is presented. But this court said in *Cohens v. Virginia*, 6 Wheat. 264, and again in *Carroll v. Lessee of Carroll*, 16 How. 275, 287, that it was "a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." An examination of the cases, in which those general expressions are found, will show that the court has never intended to adjudge that mere recitals by the officers of a municipal corporation in bonds issued in aid of a railroad corporation precluded an inquiry, even where the rights of a *bona fide* holder were involved, as to the existence of legislative authority to issue them.

A reference to a few of the adjudged cases will serve to illustrate the rule which has controlled the cases involving the validity of municipal bonds. In *Commissioners of Knox County v. Aspinwall*, 21 How. 539, power was given to county commissioners to subscribe stock to be paid for by county bonds, in aid of a railroad corporation, the power to be exercised if the electors, at an election duly called, should approve the subscription. It was adjudged that as the power existed, and since the statute committed to the board of commissioners authority to decide whether the election was properly held, and whether the subscription was approved by a majority of the electors, the recital in bonds executed by those commissioners, that they were issued in pursuance of the statute giving the power, estopped the county from alleging or proving, to the prejudice of a *bona fide* holder, that requisite notices of the election had not been given. In *Bissell v. City of Jeffersonville*, 24 How. 287, the court found that there was power to issue the bonds, and that after they were issued and delivered to the railroad company it was too late, as against a *bona fide* holder, to call in question the determination of the facts, which the law prescribed as the basis of the exercise of the power granted, and which the city authorities were authorized and required to determine before bonds were issued.

Probably the fullest statement of the settled doctrine of this court is found in *Town of Coloma v. Eaves*, 92 U. S. 484. In that case the authority to make the subscription was made, by the statute, to depend upon the result of the submission of the question to a popular vote, and its approval by a majority of the legal votes cast. But whether the statute in these particulars was complied with, was

left to the decision of certain persons who held official relations with the municipality in whose behalf the proposed subscription was to be made. It was in reference to such a case that the court said: "When legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." This doctrine was reaffirmed in *Buchanan v. Litchfield*, 102 U. S. 278, and in other cases, and we perceive no just ground to doubt its correctness, or to regard it as now open to question in this court.

But we are of opinion that the rule as thus stated does not support the position which counsel for plaintiff in error take in the present case. The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it. Such is not the case before us. Had the statutes of Ohio conferred upon a township in Delaware County authority to make a subscription to the stock of this company, upon the approval of the voters at an election previously held, then a recital, by its proper officers, such as is found in the bonds in suit, would have estopped the township from proving that no election was in fact held, or that the election was not called and conducted in the mode prescribed by law; for in such case it would be clear that the law had referred to the officers of the township, not only the ascertainment, but the decision of the facts involved in the mode of exercising the power granted. But in this case, as we have seen, power in townships to subscribe did not come into existence, that is, did not exist, except where the county commissioners had not been authorized to make a subscription. Whether they had not been so authorized, that is, whether the question of subscription had or not been submitted to a county vote, or whether the county commissioners had failed for so long a time to take the

But rule doesn't
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sense of the people as to show that they had not, within the meaning of the law, been authorized to make a subscription, were matters with which the trustees of the township, in the discharge of their ordinary duties, had no official connection, and which the statute had not committed to their final determination. Granting that the recital in the bonds that they were issued "in pursuance of the provisions of the several acts of the general assembly of Ohio," is equivalent to an express recital that the county commissioners had not been authorized by a vote of the county to subscribe to the stock of this company, and that, consequently, the power conferred upon the township was brought into existence, still it is the recital of a fact arising out of the duties of county officers, and which the purchaser and all others must be presumed to know did not belong to the township to determine, so as to confer or create power which, under the law, did not exist. In the view we have taken of this case, *McClure v. Township of Oxford*, 94 U. S. 429, is instructive. That was a case of municipal subscription to a railroad corporation. The act conferring the authority provided that it should take effect (and, therefore, should not be a law except) from and after its publication in a particular newspaper. Thirty days' notice of the election was required. But the election was held within thirty days from the publication in the paper named in the act. The bonds recited that they were issued in pursuance of the statute, describing it by the date of its passage, not the date of its publication in the newspaper designated. They showed upon their face that the election was held April 8th, 1872. But the purchaser was held bound to know that the act was not in fact published in that newspaper until March 21st, 1872; that, therefore, it did not become a law until from and after that date. He was, consequently, charged with knowledge that the election was held upon insufficient notice. The bonds were, for these reasons, declared to be not binding upon any township. The publication of the act, plainly, was not a matter with which the township trustees, as such, had any official connection. It was not made their duty to have it published. The time of publication would not necessarily appear upon the township records; but publication in a named newspaper was, as the face of the act showed, vital, not simply to the exercise but to the very existence of the power to subscribe. We may repeat here what was said in *Anthony v. Jasper County*, 101 U. S. 693, 697, that purchasers of municipal bonds "are charged with notice of the laws of the State, granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality the *bona fide* holder is protected against mere irregularities in the manner of its execution; but if there is a want of power no legal liability can be created." So here, Porter Township is estopped by the recitals in the bonds from saying that no township election was held, or that it was not called and conducted in the particular mode required by law. But it was not estopped to show

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Porter Township
had not subscribed
to the stock of the
company

the act is of such
nature and
duty of county
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that it was without legislative authority to order the election of August 30th, 1851, and to issue the bonds in suit. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance.

The judgment is affirmed.

SUTLIFF v. LAKE COUNTY COMMISSIONERS.

134

1893. 147 U. S. 230.¹

This was an action brought in the Circuit Court of the United States for the District of Colorado by a citizen of Connecticut against the county of Lake, a municipal corporation of Colorado, upon coupons for interest of six bonds for \$500 each, part of a series of ten bonds, issued by the county on July 1, 1881, payable to bearer in twenty years, and redeemable at the pleasure of the county after ten years, and containing this recital:

"This bond is one of a series of five thousand dollars, which the board of county commissioners of said county have issued for the purpose of constructing roads and bridges, by virtue of and in compliance with a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and in compliance with an act of the general assembly of the State of Colorado, entitled 'An act concerning counties, county officers and county government, and repealing laws on these subjects,' approved March 24, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

One defence was that the bonds were illegal and void, because they increased the indebtedness of the county to an amount in excess of the limit prescribed by certain provisions of the constitution and statutes of Colorado, the substance of which is stated in the opinion.

The Circuit Court gave judgment for the defendant; and the plaintiff took the case by writ of error to the Circuit Court of Appeals for the Eighth Circuit, before which the following facts were made to appear: At and before the issue and sale of said bonds, the county was in fact indebted to an amount greater than that permitted by the limitation contained in the constitution and statute of Colorado,

*Bonds issued in
(limit)*

¹ Statement abridged. — Ed.

above cited; and therefore, as a matter of fact, the issue of said series of bonds, and the issue of each one thereof created an indebtedness on the part of the county in excess of the constitutional and statutory limitation applicable to said county at the date of the issue of said bonds. The plaintiff bought six of said series of bonds, paying full value therefor, relying upon the recitals in the bonds contained, and without making any examination into the facts that might appear upon the records of the county, and without any actual knowledge of the facts other than such knowledge with which he might be held chargeable from the statements in the bonds and the constitution and statutes of Colorado.

Upon the case as above stated, the Circuit Court of Appeals certified to this court the following questions and propositions of law:

"1. In view of the provisions of the act of the legislature of Colorado, approved March 24, 1877, providing for the making of a public record of the indebtedness and financial condition of the several counties in said State, was the said John Sutliff, plaintiff herein, when about to purchase the bonds sued on and issued under the provisions of said act of March 24, 1877, charged with the duty of examining the record of indebtedness provided for in said act, in order to ascertain whether the bonds he proposed to purchase were lawfully issued or whether the issuance thereof did not increase the indebtedness of the county beyond the constitutional limit?

"2. Do the recitals found in said bonds estop the county of Lake, as against a purchaser thereof for value before maturity, from proving as a defence thereto that when said series of bonds were issued the indebtedness of the county already equalled or exceeded the amount of indebtedness which the county could legally incur under the provisions of the constitutional limitation already cited?"

John McClure for plaintiff in error.

H. B. Johnson for defendants in error.

GRAY, J. The constitution, as well as the statute, of Colorado absolutely forbade a county to issue bonds, under any circumstances, to such an amount as would make the aggregate amount of the indebtedness of the county more than six dollars on each thousand of the assessed valuation if the taxable property in the county was more than five millions of dollars, or twelve dollars if such valuation was less than five and more than one million; and limited the right to issue bonds, without a previous vote of the qualified electors of the county, to half of such rates.

The statute, moreover, required the county commissioners, in submitting the question to a vote of the electors, to enter of record an order specifying the amount required and the object of the debt; and also made it their duty to publish, and to cause to be entered on their records, open to the inspection of the public at all times, semi-annual statements, exhibiting in detail the debts, expenditures and receipts of the county for the preceding six months, and striking the

Stat.

balance so as to show the amount of any deficit and the balance in the treasury.

It is stated in the certificate upon which this case comes before us that at the time of the issue of the bonds in question the defendant county was in fact indebted beyond the constitutional and statutory limit, and the issue of each bond therefore created a debt in excess of that limit; and that the plaintiff bought the bonds, upon the faith of the recitals therein, and without making any examination into the facts appearing on the records of the county.

Upon these facts, in the light of the previous decisions of this court, it is clear that the plaintiff, although a purchaser for value and before maturity of the bonds, was charged with the duty of examining the record of indebtedness provided for in the statute of Colorado, in order to ascertain whether the bonds increased the indebtedness of the county beyond the constitutional limit; and that the recitals in the bonds did not estop the county to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the constitution.

In those cases in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the constitution or statutes of the State, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. *Marcy v. Oswego*, 92 U. S. 637; *Humboldt v. Long*, 92 U. S. 642; *Dixon County v. Field*, 111 U. S. 83; *Lake County v. Graham*, 130 U. S. 674, 682; *Chaffee County v. Potter*, 142 U. S. 355, 363.

But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.

Accordingly, in *Dixon County v. Field*, above cited, which arose under an article of the constitution of Nebraska, limiting the power of a county to issue bonds to ten per cent of the assessed valuation of the county, it was adjudged that a county issuing bonds, each reciting that it was one of a series of \$87,000 issued under and by virtue of this article of the constitution and the statutes of Nebraska upon the subject, was not estopped to show by the assessed valuation on the books of public record of the county that the bonds were in excess of the constitutional limit; and Mr. Justice Matthews, delivering the unanimous judgment of the court, fully stated the grounds of the decision, which sufficiently appear by the following extracts:

"If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite

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record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to the proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument." 111 U. S. 93.

"In the present case there was no power at all conferred to issue bonds in excess of an amount equal to ten per cent upon the assessed valuation of the taxable property in the county. In determining the limit of power, there were necessarily two factors: the amount of the bonds to be issued, and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment or determination as to that fact is submitted to the county officers.

They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it." 111 U. S. 95.

That decision and the grounds upon which it rests were approved and affirmed in *Lake County v. Graham* and *Chaffee County v. Potter*, above cited, each of which arose under the article of the constitution of Colorado now in question, but under a different statute, which did not require the amount of indebtedness of the county to be stated on its records. In *Lake County v. Graham*, each bond showed on its face the whole amount of bonds issued, and the recorded valuation of property showed that amount to be in excess of the constitutional limit; and for this reason, as well as because the bonds contained no recital upon that point, the county was held not to be estopped to plead that limit. 130 U. S. 682, 683. In *Chaffee*

County v. Potter, on the other hand, the bonds contained an express recital that the total amount of the issue did not exceed the constitutional limit, and did not show on their face the amount of the issue, and the county records showed only the valuation of property, so that, as observed by Mr. Justice Lamar in delivering judgment: "The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises." 142 U. S. 263.

The case at bar does not fall within *Chaffee County v. Potter*, and cannot be distinguished in principle from *Dixon County v. Field* or from *Lake County v. Graham*. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be so shown, the valuation of the property, and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds.

It follows that the first question certified must be answered in the affirmative, and the second in the negative. Ordered accordingly.

GUNNISON COUNTY COMMISSIONERS v. ROLLINS. 135

1899. 173 U. S. 255.

HARLAN, J.¹ This action was brought by E. H. Rollins & Sons, a corporation of New Hampshire, to obtain a judgment against the Board of Commissioners of Gunnison County, Colorado, a municipal corporation of that State, for the amount of certain coupons of bonds issued by the defendant in 1882. At the close of the evidence the defendant requested a peremptory instruction in its behalf. The Circuit Court charged the jury at some length, but concluded with a direction to find a verdict for the defendant, which was done, and a judgment in its favor was entered. That judgment was reversed in the Circuit Court of Appeals, and the case is here upon writ of *certiorari*. 49 U. S. App. 399.

The answer of the county contained a general denial of all the allegations of the complaint, and in addition set out eleven affirmative defences, which were chiefly based upon the alleged fact that the county,

¹ Part of the opinion is omitted. — Ed.

in issuing the bonds set forth in the complaint, had attempted to incur an indebtedness not authorized by the constitution of Colorado or by the statute referred to in the bonds.¹

recitals

The bonds to which were attached the coupons in suit recited that they were issued by the Board of County Commissioners "in exchange at par for valid floating indebtedness of the county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an act of the General Assembly of the State of Colorado, entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881;" that "all the requirements of law have been fully complied with by the proper officers in the issuing of this bond;" that the total amount of the issue did "not exceed the limit prescribed by the constitution of the State of Colorado;" and that such issue had been authorized by a vote of a majority of the duly qualified electors of the county, voting on the question at a general election duly held in the county on the 7th day of November, 1882.

... that debt not exceeded.

Do such recitals estop the county from asserting against a *bona fide* holder for value that the bonds so issued created an indebtedness in excess of the limit prescribed by the constitution of Colorado? An answer to this question can be found in former decisions of this court. It is necessary to advert to those decisions, particularly those in which the court considered the effect of recitals importing compliance with constitutional provisions.

In *Buchanan v. Litchfield*, 102 U. S. 278, 290, 292, which was a suit on interest coupons of municipal bonds, the defence was made that the bonds were issued in violation of that clause of the constitution of the State providing that "no county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." This court said: "As, therefore, neither the constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their 'existing indebtedness,' it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the constitution were met—that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit—then the city, under

¹ The Constitution contained a clause fixing a limit to county indebtedness. The statute provided for a referendum vote of taxpayers on the issue of bonds. — Ed.

the decisions of this court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds. The case might then, perhaps, have been brought within the rule announced by this court in *Town of Coloma v. Eaves*, 92 U. S. 484, in which case we said, and now repeat, that 'where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made on the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' So, in the more recent case of *Orleans v. Pratt*, 99 U. S. 676, it was said that 'where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital.' Again: "A recital that the bonds were issued under the authority of the statute and in pursuance of the city ordinance, did not necessarily import a compliance with the constitution. Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated, in any form, that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or statement as to the extent of its existing indebtedness."

In *Northern Bank of Toledo v. Porter Township*, 110 U. S. 608, 616, 619, which was an action on municipal bonds, and involved a question respecting the conclusiveness as between the municipality and a *bona fide* holder for value of recitals in the bonds that they had been issued in conformity to law, the court referred to the above rule established in *Town of Coloma v. Eaves*, and said: "We are of opinion that the rule as thus stated does not support the position which counsel for plaintiff in error take in the present case. The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, but, equally, as authentic and final evidence of their existence, for the information and action of

all others dealing with them in reference to it. . . . The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance."

A leading case on this subject is *Dixon County v. Field*, 111 U. S. 88, 92-94, which involved the validity of bonds issued in the name of Dixon County, Nebraska, the constitution of which State prescribed conditions upon which donations could be made to a railroad or other work of internal improvement by cities, towns, precincts, municipalities or other subdivisions of the State, and imposed limitations upon the amount thereof and upon the mode of creating municipal debts of that kind. The principal question was as to the conclusiveness of certain recitals in the bonds sued on in that case. This court said: "The estoppel does not arise, except upon matters of fact which the corporate officers had authority by law to determine and to certify. It is not necessary, it is true, that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, where more than one is involved, is a determination and certificate as to each essential particular. But it still remains that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is, that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence, by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case, it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect. So, if the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of

the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in that instrument. This principle is the essence of the rule declared upon this point, by this court, in the well-considered words of Mr. Justice Strong, in *Coloma v. Eaves*, 92 U. S. 484, where he states (p. 491) that it is, 'where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with,' that 'their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' The converse is embraced in the proposition and is equally true. If the officers authorized to issue bonds, upon a condition, are not the appointed tribunals to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject."

In *Lake County v. Graham*, 130 U. S. 674, 680, 683-684, the question was as to the validity of certain bonds issued by Lake County, Colorado, under the very statute of that State referred to in the bonds the coupons of which are here in suit, namely, the above act of February 21, 1881, authorizing the several counties of the State to fund their floating indebtedness. It was recited in each of the bonds sued on in that case that they were issued under and by virtue of and in full compliance with that act, and that "all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond." No one of the bonds, let it be observed, contained any recital that it was issued in conformity to the provisions of the state constitution. This court said: "Nothing is better settled than this rule — that the purchaser of bonds, such as these, is held to know the constitutional provisions and the statutory restrictions bearing on the question of the authority to issue them; also the recitals of the bonds he buys; while, on the other hand, if he act in good faith and pay value, he is entitled to the protection of such recitals of facts as the bonds may contain. In this case the constitution charges each purchaser with knowledge of the fact that, as to all counties whose assessed valuation equals one million of dollars, there is a maximum limit beyond which those counties can incur no further indebtedness under

any possible conditions, provided, that in calculating that limit, debts contracted before the adoption of the constitution are not to be counted. The statute, on the other hand, charges the purchaser with knowledge of the fact that the county commissioners were to issue bonds, at par, in exchange for such warrants of the county as were themselves issued prior to the date of the first publication of the notice provided for; that the only limitation on the issue of bonds in the statute was, that the bonds should not exceed in amount the sum of the county indebtedness on the day of notice aforesaid; that while the commissioners were empowered to determine the amount of such indebtedness, yet the statute does not refer that board, for the elements of its computation, to the constitution or to the standards prescribed by the constitution, but leaves it open to them, without departing from any direction of the statute, to adopt solely the basis of the county warrants. The recitals of the bonds were merely to the effect that the issue was 'under, and by virtue of, and in full compliance with,' the statute; 'that all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond;' and that the issuing was 'authorized by a vote of a majority of the duly qualified electors,' etc.; no express reference being made to the constitution, nor any statement made that the constitutional requirements had been observed. There is, therefore, no estoppel as to the constitutional question, because there is no recital in regard to it. *Carroll County v. Smith*, 111 U. S. 556." In disposing of the contention that, under the doctrines of certain adjudged cases, the county was estopped to deny that the bonds were issued in conformity to the constitution, the court said: "The question here is distinguishable from that in the cases relied on by counsel for the defendant in error. In this case the standard of validity is created by the constitution. In that standard two factors are to be considered; one the amount of assessed value, and the other the ratio between that assessed value and the debt proposed. These being exactions of the constitution itself, it is not within the power of a legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts. In the case of *Sherman County v. Simons*, 109 U. S. 735, and others like it, the question was one of estoppel as against an exaction imposed by the legislature; and the holding was, that the legislature, being the source of exaction, had created a board authorized to determine whether its action had been complied with, and that its finding was conclusive to a bona fide purchaser. So also in *Oregon v. Jennings*, 119 U. S. 74, the condition violated was not one imposed by the constitution, but one fixed by the subscription contract of the people."

This brings us in our reference to the authorities to the important case of *Chaffee County v. Potter*, 142 U. S. 855, 868, 864, 866. That was an action upon coupons of bonds issued by Chaffee County, Col-

orado, under the act of February 21, 1881, under which the bonds here in suit were issued. The bonds and coupons were in the same form and contained the *same recitals* as the above bonds issued by Gunnison County, and were of like date. The defence in part in the *Chaffee County* case was that the bonds, and each of them, were issued in violation of the constitution of the State. After referring to the decision in *Lake County v. Graham* (the bonds in which did not contain any express recitals as to the constitutional limit of indebtedness), and stating that it was based largely on the ruling in *Dixon County v. Field*, this court said: "To the views expressed in that case we still adhere; and the only question for us now to consider, therefore, is: Do the additional recitals in these bonds, above set out, and in the absence from their face of anything showing the total number issued of each series, and the total amount in all, estop the county from pleading the constitutional limitation? In our opinion these two features are of vital importance in distinguishing this case from *Lake County v. Graham* and *Dixon County v. Field*, and are sufficient to operate as an estoppel against the county. Of course, the purchaser of bonds in open market was bound to take notice of the constitutional limitation on the county with respect to indebtedness which it might incur. But when, upon the face of the bonds, there was any express recital that the limitation had not been passed, and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in the *Lake County* case, and in *Dixon County v. Field*, that, as a matter of fact, the constitutional limitation had been exceeded, in the issue of the series of bonds. The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is — What does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in *Lake County v. Graham* and *Dixon County v. Field*. But that is not this case. Here, by virtue of the statute under which the bonds were issued, the county commissioners were to determine the amount to be

issued, which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds, at par. The statute, in terms, gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the constitution of the State and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and *that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue*, under the law, *estops the county from saying that it is untrue.* *Town of Coloma v. Eaves*, 92 U. S. 484; *Town of Venice v. Murdock*, 92 U. S. 494; *Marcy v. Township of Oswego*, 92 U. S. 637; *Wilson v. Salamanca*, 99 U. S. 499; *Buchanan v. Litchfield*, 102 U. S. 278; *Northern Bank v. Porter Township*, 110 U. S. 608." After referring to what was said in *Town of Coloma v. Eaves* and *Buchanan v. Litchfield*, the court thus concludes its opinion: "We think this case comes fairly within the principles of those just cited; and that it is not governed by *Dixon County v. Field* and *Lake County v. Graham*, but is distinguishable from them in the essential particulars above noted."

It is contended that the present case is controlled by *Sutliff v. Lake County Commissioners*, 147 U. S. 230, 235, 237-8, rather than by *Chaffee County v. Potter*. The action in the *Sutliff* case was upon coupons of bonds issued by a county of Colorado, each bond reciting that it was issued under and by virtue of and in compliance with the act of assembly entitled "An act concerning counties, county officers and county government, and repealing laws on these subjects," approved March 24, 1877, and it was certified in each bond that "all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond." It was a vital fact in that case that there was no recital in the bonds that the indebtedness thus created was not in excess of the constitutional limit. Still the defence was that the bonds in fact increased the indebtedness of the county to an amount in excess of the limit prescribed by the state constitution and therefore were illegal and void. The court, upon the facts certified and in the light of previous decisions, held it to be clear that "the plaintiff, although a purchaser for value and before maturity of the bonds, was charged with the duty of examining the records of indebtedness provided for in the statute of Colorado, in order to ascertain whether the bonds increased the indebtedness of the county beyond the constitutional limit; and that the recitals in the bonds did not estop the county to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the constitution. In those cases," it continued, "in which this court has held a municipal

Sutliff

a) Def. in
recital, (f)
This is a recital
with compliance
with the Const.

corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the constitution or statutes of the State, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. *Marcy v. Oswego*, 92 U. S. 637; *Humboldt v. Long*, 92 U. S. 642; *Dixon County v. Field*, 111 U. S. 83; *Lake County v. Graham*, 130 U. S. 674, 682; *Chaffee County v. Potter*, 142 U. S. 355, 363. But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds." After referring to *Dixon County v. Field*, above cited, the court proceeded to show the precise grounds upon which the decisions in *Lake County v. Graham* and *Chaffee County v. Potter* were rested: "That decision [*Dixon County v. Field*] and the ground upon which it rests were approved and affirmed in *Lake County v. Graham* and *Chaffee County v. Potter*, above cited, each of which arose under the article of the constitution of Colorado now in question, but under a different statute, which did not require the amount of indebtedness of the county to be stated on its records. In *Lake County v. Graham*, each bond showed on its face the whole amount of bonds issued, and the recorded valuation of property showed that amount to be in excess of the constitutional limit; and for this reason, as well as because the bonds contained no recital upon that point, the county was held not to be estopped to plead that limit. 130 U. S. 682, 683. In *Chaffee County v. Potter*, on the other hand, the bonds contained an express recital that the total amount of the issue did not exceed the constitutional limit, and did not show on their face the amount of the issue, and the county records showed only the valuation of property, so that, as observed by Mr. Justice Lamar in delivering judgment: 'The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises.' 142 U. S. 363. The case at bar does not fall within *Chaffee County v. Potter*, and cannot be distinguished in principle from *Dixon County v. Field* or from *Lake County v. Graham*. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be so shown, the valuation of the property, and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take

notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds."

It thus appears that in the *Sutliff* case the court neither modified, nor intended to modify, but distinctly recognized, the principle announced in *Chaffee County v. Potter*, namely, that the recital in the bonds that the debt thereby created did not exceed the limit prescribed by the constitution estopped the county from asserting, as against a *bona fide* holder for value, that the contrary was the fact.

the case same
as Chaffee case

We have made this extended reference to adjudged cases because of the wide difference among learned counsel as to the effect of our former decisions. This course has also been pursued in order to bring out clearly the fact that the present case is controlled by the judgment in *Chaffee County v. Potter*. The views of the Circuit Court, as expressed in its charge in this case and as enforced by its peremptory instruction to find for the defendant, cannot be approved without overruling that case. It was expressly decided in the *Chaffee County* case that the statute under which the bonds there in suit (the bonds here in suit being of the same class) authorized the County Commissioners to determine whether the proposed issue of bonds would in fact exceed the limit prescribed by the constitution and the statute; and that the recital in the bond to the effect that such determination had been made and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true. We decline to overrule *Chaffee County v. Potter*, and upon the authority of that case, and without reexamining or enlarging upon the grounds upon which the decision therein proceeded, we adjudge that as against the plaintiff the county of Gunnison is estopped to question the recital in the bonds in question to the effect that they did not create a debt in excess of the constitutional limit and were issued by virtue of and in conformity with the statute of 1881 and in full compliance with the requirements of law.

1) Stat. authorized
com. to determine
whether issue would
in fact exceed
const. limit.

2) Bonds do not show
recital untrue.

We have assumed thus far that the plaintiff corporation was a *bona fide* purchaser or holder of the bonds to which the coupons in suit were attached. Upon this question we concur in the views expressed by the Circuit Court of Appeals. Speaking by Judge Thayer, that court said: "The testimony contained in the present record shows, we think, without contradiction that the plaintiff was a *bona fide* holder when the suit was brought of at least five of the bonds which are involved in the present controversy, because it holds the title of Joseph Stanley, who was himself an innocent purchaser of said bonds before maturity, for the price of ninety-eight cents on the dollar. The rights which Stanley acquired by virtue of such purchase inure to the plaintiff, by virtue of its purchase of the bonds from Stanley in June, 1892, and this without reference to any knowledge which the plaintiff may have had at the latter date affecting the validity of the securities. A

bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defences existing against the paper. *Commissioners of Marion County v. Clark*, 94 U. S. 278, 286; *Hill v. Scotland County*, 34 Fed. Rep. 208; Daniel on Negotiable Instruments (4th ed.), § 808, and cases there cited." 49 U. S. App. 399, 413.

The remaining five bonds owned by the plaintiff corporation were also purchased from Stanley, who received them directly from the county in exchange for warrants that he owned and held. There is no reason why upon the surrender of county warrants for county bonds he was not entitled to the benefit of the rule above declared as to the conclusiveness of the recital in the bonds, or why he may not be regarded as much an innocent holder of the bonds exchanged for county warrants as of the other bonds purchased by him in open market. There is no proof that at the time of such exchange he had or was chargeable with knowledge or notice that the debt created by the bonds exceeded the constitutional limit; consequently, in taking the bonds in exchange he was entitled, for the reasons heretofore given, to rely upon the truth of the recitals contained in them. When the Board of County Commissioners, proceeding under the act of 1881, offered to exchange county bonds for the warrants held by him, he was entitled under the circumstances disclosed to assume it to be true as recited in the bonds that the constitutional limit was not being exceeded.

It is insisted with much earnestness that the principles we have announced render it impossible for a State by a constitutional provision to guard against excessive municipal indebtedness. By no means. If a state constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in the open market in good faith. Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defence that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities.

It follows that the Circuit Court erred in directing the jury to return a verdict for the defendant.

What has been said renders it unnecessary to consider various questions arising upon exceptions to specific rulings in the Circuit Court as to the admission and exclusion of evidence, and as to those parts of the charge to which objections were made. Those rulings were inconsistent with the principles herein announced.

Const. ...
guard ...
indebtedness by
limiting ...
rule ...

As neither the Circuit Court nor the Circuit Court of Appeals proceeded in accordance with the principles herein announced, the judgment of each court is

Reversed, and the cause is remanded for further proceedings consistent with this opinion.¹

CITY OF LOUISIANA v. WOOD.

1880. 102 U. S. 294.²

ERROR to U. S. Circuit Court for Eastern District of Missouri.

11- Action by Wood to recover back from the city money paid for certain bonds. The city had authority in law to borrow money, and to provide for the payment of its debts. An ordinance was passed, authorizing the city fund commissioner to negotiate bonds of the city for the purpose of raising money to liquidate the city debt, at a rate of discount not exceeding fifteen per cent. Before any bonds had been issued under this ordinance, the legislature, on March 28, 1872, passed a statute which provides that before any bond hereafter issued by any city, for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the State Auditor, who shall register the same, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case.

On the 16th of July, 1872, after this act went into effect, the city, for the purpose of raising money to pay its interest-bearing debts and the expenses of its government, caused to be executed by its proper officers, and sealed with its corporate seal, twenty-one bonds, payable to bearer on the 1st of January, 1887, for \$1,000 each, with coupons attached for semi-annual interest at the rate of ten per cent per annum. These bonds contained recitals that they were issued under the authority of the charter and the ordinance of Jan. 8, 1867. Although not actually executed until July 16, 1872, the city, "for the purpose of evading the provisions of said registration law, and with the intent to make it falsely appear that said bonds were not subject to the requirements of said law, caused said bonds to be antedated as of the first day of January, 1872, and caused it to be falsely stated in them that they were signed, countersigned, and sealed on the day last named." The bonds thus executed were, without being registered, placed by the fund commissioner in the hands of a respectable stock and bond broker in St. Louis, to sell for the account of the city. On the 25th of August, 1873, the broker and

¹ See also *Waite v. Santa Cruz*, 184 U. S. 302.

² Statement abridged. — Ed.

20 cases.
20 pages.

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As citals

to fraudulently
cause

agent sold and delivered to the plaintiff below, now the defendant in error, ten of the bonds at ninety per cent of their face value, and on the 1st of September nine more at the same rate. On the 24th of June he sold to Lewis Dorsheimer one bond, and on the 24th of February, 1874, another to John F. Gibbons, at the same price. The price was in each case paid to the broker in money, the purchasers all the time being ignorant of the fact that the bonds were actually executed after the registration law went into effect, or that the recitals were not in all respects true. They bought the bonds, and paid for them in good faith, believing them to be what on their face they purported to be, and obligatory on the city. The broker, with the assent of the fund commissioner, retained from the money realized on the sales five per cent on the par value of the bonds sold, for his services, and paid the residue to the commissioner, who, with the sanction of the city council, used part in the payment and redemption of matured bonds, coupons, and warrants of the city, and handed over the rest to the city treasurer. The fund commissioner reported the sales of the bonds to the city council, and charged himself with a sum equal to eighty-five per cent of the par value as the sum realized by him, making no mention of the amount retained by the broker for services. His accounts were examined and approved by the city council, and the bonds, coupons, and warrants taken up by his payments were destroyed. The interest on the bonds thus sold was met in full by the city as it matured until Jan. 1, 1876, when only forty per cent was paid, and on the 1st of July of that year the city declared its purpose not to pay either principal or interest, claiming that the bonds were invalid because not registered.

The bonds bought by Dorsheimer and Gibbons were transferred to the plaintiff. After the city had repudiated its obligation, he offered to return the whole twenty-one bonds, and demanded the repayment of the several sums paid for them. This being refused, the present suit was brought to recover back the money so paid. Upon the foregoing facts the court gave judgment against the city for \$18,900, and interest at the rate of six per cent per annum from the time the payment of the interest on the bonds was stopped. To reverse that judgment, the city brought the case to this court, and the error assigned is that the facts found are not sufficient to support the judgment.

David P. Dyer for the plaintiff in error.

John D. S. Dryden, contra.

MR. CHIEF JUSTICE WAITE, after stating the facts, delivered the opinion of the court.

That the bonds in question are invalid, is conceded. Such is the effect of *Anthony v. County of Jasper* (101 U. S. 693), decided at the last term. It is equally true that the legal effect of the transactions by which the plaintiff and his assignors got possession of the bonds was a borrowing by the city of the money paid for what was sup-

posed to be a purchase of the bonds. As the broker through whom the business was done was the agent of the city and acting as such, the case, so far as the city is concerned, is the same as though the money had been paid directly into the city treasury and the bonds given back in exchange. The fact that the purchasers did not know for whom the broker was acting is, for all the purposes of the present inquiry, immaterial. They believed they were buying valid bonds which had been negotiated and were on the market, when in reality they were loaning money to the city, and got no bonds. The city was in the market as a borrower, and received the money in that character, notwithstanding the transaction assumed the form of a sale of its securities.

*City had power to
borrow & to
money in that capacity*

The city, by putting the bonds out with a false date, represented that they were valid without registry. The bonds were bought and the price was paid under the belief, brought about by the conduct of the city, that they had been put out and had become valid commercial securities before the registry law went into effect. It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit. The city could lawfully borrow. The objection goes only to the way it was done. As the purchasers were kept in ignorance of the facts which made the bonds invalid, they did not knowingly make themselves parties to any illegal transaction. They bought the bonds in open market, where they had been put by the city in the possession of one clothed with apparent authority to sell. The only party that has done any wrong is the city.

*Purchasers acted
in ignorance*

In *Moses v. MacFerlan* (2 Burr. 1005), it is stated as a rule of the common law, that an action "lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition." The present action can be sustained on either of these grounds. The money was paid for bonds apparently well executed, when in fact they were not, because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made has failed, because the bonds were not, in fact, valid obligations of the city. And the money was got through imposition, because the city, with intent to deceive, pretended that the false date the bonds bore was the true one. While, therefore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. As we took occasion to say in *Marsh v. Fulton County* (10 Wall. 676), "the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

money paid for

It is argued, however, that, as the city was only authorized by law to borrow money at a rate of interest not exceeding ten per cent per annum, the money cannot be recovered back, because a sale of the bonds involved an obligation to pay interest beyond the limited

rate, and the borrowing was, therefore, *ultra vires*. There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other.

only Kis implied one to

Again, it was contended that, as the money in this case was borrowed to take up bonded indebtedness, the transaction was *ultra vires*, because the effect of the eleventh section of the act of 1872 was to repeal all earlier laws authorizing the borrowing of money for such purposes. We do not so understand that section. The old power to borrow, which the charter gave, was left unimpaired, but, under this new provision, registered bonds might be issued in place of old ones, if the city and the holders of the old bonds could agree on terms and the people gave their assent. In this way the holders of old bonds might avail themselves of the special tax which the law of 1872 required should be levied to meet the obligation of all registered bonds; but the city was not prevented from borrowing money to pay old bonds if it saw fit to do so, or if it could not agree on the terms of exchange.

not UV

The judgment below was right, and it is consequently

Affirmed.

RAILROAD NATIONAL BANK v. CITY OF LOWELL.

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1872. 109 Mass. 214.

CONTRACT to recover \$3397 as money had and received to the plaintiffs' use. The case was submitted to the judgment of this court on the following statement of facts:

In 1864 Thomas G. Gerrish was chosen treasurer of the defendants, held the office by successive annual elections, and discharged the duties thereof until after March 10, 1869. During all this time he, as treasurer, had an account with the plaintiffs and with no other bank, under an arrangement between the parties that the accounts of the defendants should be kept there. In each of the years 1865, 1866, 1867 and 1868, the city council authorized him to borrow money of the plaintiffs in anticipation of the collection of taxes, and the sums so borrowed were always repaid with interest. In March 1869, Gerrish was a defaulter to the defendants as treasurer, to the amount of \$30,000, but the fact was unknown to the parties to this action. and on the evening of March 9 a resolution, authorizing him to bor-

row \$130,000 from the plaintiffs, in anticipation of the collection of taxes for that year, was introduced into the common council, read once, and ordered to a second reading.

On the morning of March 10, 1869, at which time the amount standing to the credit of Gerrish as treasurer, in the plaintiffs' hands, was \$2674, he stated to the plaintiffs' cashier that the necessary authority to borrow money had been granted the evening before, that the papers were not executed, and that he wished to overdraw his account. He therefore, without the knowledge of the defendants, or any especial authority from them, presented to the plaintiffs a check signed by himself as city treasurer, payable to his own order, and indorsed by him, for \$5000, received the money therefor from the plaintiffs, placed the same in the cash-drawer where he kept the defendants' money, with "a small sum, exceeding \$100," remaining there after the business of the preceding day; and from the money there he paid during the same day, to various creditors of the defendants, upwards of \$4900. The rest of it was left there, and came into the possession of the defendants. He afterwards on the same day drew another check upon the plaintiffs, signed by himself as city treasurer, payable to bearer, for \$1072, to pay a debt due from the defendants to a gaslight company, which check was presented to the plaintiffs by the company and paid on the same day.

On March 11, 1869, Gerrish resigned his office. He never kept a private account with the plaintiffs. Demand was made on the defendants on March 12, 1869.

C. Allen & F. W. Kittredge, for the plaintiffs.

T. H. Sweetser & J. F. McEvoy, for the defendants.

WELLS, J. That the city is not liable for the money as a loan, because it was advanced to its treasurer or paid upon his checks, is fully settled by the decisions in *Lowell Five Cents Savings Bank v. Winchester*, 8 Allen, 109; *Benoit v. Conway*, 10 Allen, 528; and *Dickinson v. Conway*, 12 Allen, 487.

It was also decided in *Kelley v. Lindsey*, 7 Gray, 287, that money advanced on account of the defendant to one in his employ, but who had no authority to borrow money for him, created no debt against the defendant, although advanced for the purpose of being expended in his business and to pay his debts, and actually so applied. That decision appears to us to be conclusive against the plaintiff in this case.

In *Dill v. Wareham*, 7 Met. 438, cited by the plaintiff, the money was paid into the treasury of the town in pursuance of a contract made by authority of a vote of the town.

In *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, and *Skinner v. Merchants' Bank*, 4 Allen, 290, the money came into the actual possession and control of the defendant bank. The legal possession of money received by the officers of a bank, in the usual mode, is in the corporation, and not in the officers in whose charge and manual control it is intrusted. *Commonwealth v. Tuckerman*, 10 Gray, 173.

asurer
city treasurer
cashier
creditors

City not liable for

The treasurer of a city or town is an independent accounting officer, by statute made the depository of the moneys of the city or town. Gen. Sts. c. 18, §§ 54, 59; c. 19, § 2. The legal possession of the specific moneys in his hands, from whatever source, is in him. Hancock v. Hazard, 12 Cush. 112. Coleraine v. Bell, 9 Met. 499. All moneys of the city or town he holds as its property, and exclusively for its use. But he holds them by virtue of his public official authority and duty, and not merely as the agent or servant of a corporation.

The fact that the money in this case went into the hands of the treasurer, and was placed in the drawer provided by the city for his use in keeping the funds of the city, is not enough to charge the defendant with liability.

The result is, therefore, that the defendant is entitled to judgment.

COLT, J., IN AGAWAM NATIONAL BANK v. INHABITANTS OF SOUTH HADLEY.

1880. 128 Mass. 503, pp. 508, 509.

COLT, J. . . . It is said that an action for money had and received may be maintained against a municipal corporation, when the money has been received under such circumstances that, independently of express contract, the obligation of repayment is imposed as a matter of right and justice. Thus, when it is received under a contract made without authority or in violation of law, the duty arises to refund the money to the party from whom it was received, if, without affirming the illegal contract, the latter seeks only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. Morville v. American Tract Society, 128 Mass. 129. Dill v. Wareham, 7 Met. 438. White v. Franklin Bank, 22 Pick. 181. See also Thomas v. Richmond, 12 Wall. 349, 355. But in such cases it must appear that the money was actually and beneficially appropriated by the town or city in its corporate capacity. It cannot be treated as appropriated merely because it has been applied by the unauthorized act of the town treasurer, or of any other person, to the payment of municipal debts, for the payment of which other provision had been made. It is sometimes said, indeed, with reference to money borrowed in disregard of positive prohibition, when both parties are in fault, that it cannot under any circumstances be recovered back, because that would be to defeat the prohibition in favor of a guilty party. McDonald v. Mayor, &c. of New York, 68 N. Y. 23. Parr v. Greenbush, 72 N. Y. 463, 472. Herzo v. San Francisco, 33 Cal. 134. Argenti v. San Francisco, 16 Cal. 255, 282. See also Dillon Mun. Corp. § 383.

treasurer
Hancock v. Hazard
Coleraine v. Bell

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FIELD, J., IN CRAFT v. SOUTH BOSTON R. R. 139

1889. 150 Mass. 207, p. 210.

FIELD, J. . . . Whether a person under any circumstances can be made a debtor for money borrowed by another for him, without authority, and appropriated to his use without his knowledge or consent, need not be considered. See *Kelley v. Lindsey*, 7 Gray, 287. No obligation on the part of the defendant ought to be implied in this case, because Reed was a defaulter, and the money was used to cover up his defalcation by paying debts of the company, which the money of the company, if he had not embezzled it, would have been used to pay. The only reasonable inference is that Reed's primary purpose in using the money in this way was to escape detection and to benefit himself. Whether it was a benefit to the company that he was able to obtain and use money for this purpose is necessarily uncertain. The money was not borrowed *bona fide* for the use of the company. See *Railroad National Bank v. Lowell*, 109 Mass. 214; *Agawam National Bank v. South Hadley*, 128 Mass. 503.

MCDONALD v. MAYOR, &c., OF NEW YORK. 140

1876. 68 New York, 23.¹

APPEAL from order of the General Term of the Supreme Court in the first judicial department reversing a judgment in favor of plaintiff entered upon a verdict, and granting a new trial.

This action was brought to recover the value of certain gravel and stone alleged to have been sold and delivered by plaintiff to defendant and used in the repair of one of its streets.

The material was, as the evidence tended to show, furnished by plaintiff in 1869 and 1870, at the request of the superintendent of roads, to whom the bills were given and were certified by him to the street department. The material was taken and used on the streets. Further facts appear in the opinion.

Henry Parsons, for appellant.

D. J. Dean, for respondent.

FOLGER, J. The plaintiff sues to recover from the city the value of materials furnished by him to certain officials, which were used in the repair of a public way. The amount he claims is over \$1,600 in the whole. The materials were furnished at different times, in parcels, each of which, except one, was less in value than \$250.

He does not aver, nor did he prove in terms, that a necessity for

¹ Arguments omitted. — Ed.

a the purchase or use of the materials was certified to by the head of
 b the department of public works, or that the expenditure therefor was
 c authorized by the common council (Laws of 1857, vol. 1, p. 886, chap.
 446, § 38); nor did he aver or prove in terms, that a contract for
 the purchase of the materials was entered into by the appropriate
 head of department, upon sealed bids or proposals, made in compli-
 ance with public notice advertised. (Id.)¹

The existence and stringency of these statutory provisions are
 recognized by plaintiff's counsel, but the force of them is sought to
 be avoided. It is urged, that the object of the expenditure was
 proper, as it is part of the defendant's corporate duty to keep public
 ways in repair; that the material was delivered to the superintendent
 of roads, an official of the defendant, charged with carrying that duty
 into practical effect; and that the plaintiff had reason to believe that
 the superintendent was acting within the line of his duties. The first
 two of these propositions may be admitted; the third may not be.
 Doubtless, to the apprehension of the plaintiff, the superintendent
 was so acting, as to do work which it was the duty of the defendant
 to cause to be done. But we see nothing in the case which brought
to his mind, so as to create a belief, that there had been a contract
made for the material, as above indicated, or that the necessity for
the expenditure had been certified to and authorized, as required by
law. And though the superintendent of roads had certified to be
 correct, the bills for the materials, rendered by the plaintiff, this did
 not meet the letter of the statute laws. Such certification did not
 precede the reception of the material; nor was the certification by the
 head of the department; nor was the taking and use of the material,
 nor payment for it, authorized by the common council. Nor can it
 be that the provisions of the statute, are alone for the instruction of
 the department and officials of the defendant. They were a restraint
 upon them, but upon other persons as well. They put upon all who
would deal with the city, the need of first looking for the authority.

¹ "All contracts to be made or let by authority of the common council for work to
 be done or supplies to be furnished . . . shall be made by the appropriate heads of
 departments, under such regulations as shall be established by ordinances of the com-
 mon council. Whenever any work is necessary to be done to complete or perfect a
 particular job, or any supply is needful for any particular purpose, which work and
 job is to be undertaken or supply furnished for the corporation, and the several parts
of the said work or supply shall together involve the expenditure of more than two
 hundred and fifty dollars, the same shall be by contract, under such regulations con-
 cerning it as shall be established by ordinance of the common council, unless by a
 vote of three-fourths of the members elected to each board, it shall be ordered other-
 wise; and all contracts shall be entered into by the appropriate heads of departments,
 and shall be founded on sealed bids or proposals made in compliance with public
 notice . . . ; and all such contracts when given shall be given to the lowest bidder. . . .

No expenditure for work or supplies involving an amount for which no contract
 is required, shall be made, except the necessity therefor be certified to by the head of
 the appropriate department, and the expenditure be as authorized by the common
 council." *New York Laws of 1857, Chap. 446, Sect. 38. — Ed.*

Stat. = limit on
of
 of the agent with whom they bargain. Quite clearly do they impose upon the paying agent of the defendant a prohibition against an unauthorized expenditure. And are they not also a restraint upon the municipality itself? They are fitted to insure official care and deliberation, and to hold the agents of the public to personal responsibility for expenditure; and they are a limit upon the powers of the corporation, inasmuch as they prescribe an exact mode for the exercise of the power of expenditure.

their
 It is said that the plaintiff had a right to presume, that the agents of the defendant transacted their business properly, and under sufficient authority. Does not this involve, also, that the plaintiff had a right to presume, that it was the business of the superintendent of roads to purchase material for the city upon the credit of the city, and that he had authority so to do? This cannot be maintained. It is fundamental, that those seeking to deal with a municipal corporation through its officials, must take great care to learn the nature and extent of their power and authority. (*Hodges v. Buffalo*, 2 Denio, 110; cited 33 N. Y., 293; *Cornell v. Guilford*, 1 Den., 510; *Savings Bank v. Winchester*, 8 Allen, 109.) The plaintiff cites *United States Bank v. Dandridge* (12 Wheat., 70). But there it is said that if the charter imposes restrictions they must be obeyed. Could the plaintiff presume that it was the duty of the defendant to keep the Kingsbridge road in repair? No; he must look to its charter to learn of that duty. The same instrument would show him just how it must obtain the material to perform that duty. *The Gas Company v. San Francisco* (9 Cal., 453) is also cited. The real question there decided was, that a city can be held to have incurred a liability otherwise than by ordinance. There was no stress in that case upon any inhibitions in the charter of the city. The result was arrived at by a divided court.

But the main reliance of the plaintiff, is upon the proposition that the defendant, having appropriated the materials of the plaintiff and used them, is bound to deal justly and to pay him the value of them. The case of *Nelson v. The Mayor* (63 N. Y., 535) is cited. The learned judge who delivered the opinion in that case does, indeed, use language which approaches the plaintiff's proposition; but the judgment in that case did not go upon the doctrine there put forth; and when the opinion is scrutinized it does not quite cover this case. It is said: "If it (the city), obtains property under a void contract, and actually uses the property, and *collects the value of it from property owners by means of assessments*, the plainest principles of justice require that it should make compensation, for the value of such property, to the person from whom it was obtained." The words we have marked in italics indicate a difference between the two propositions; though it is to be admitted, not a great difference in the principles upon which each rests. The case in the California courts (*Argenti v. San Francisco*, 16 Cal., 255), goes upon the ground

set forth in the opinion in *Nelson's Case*, (*supra*). There is, however, a more radical difference, than that above noted, in the two cases cited and that in hand. In those two cases the way was open for implying a promise to pay what the property was worth, if with no disregard of statute law, such an implication was admissible; that is to say, there was in those cases, so far as appears from the facts, no express inhibition upon the city that it should not incur a liability save by an express contract. Here there is an express legislative inhibition upon the city, that it may not incur liability unless by writing and by record. How can it be said that a municipality is liable upon an implied promise, when the very statute which continues its corporate life, and gives it its powers, and prescribes the mode of the exercise of them, says, that it shall not, and hence cannot, become liable, save by express promise? Can a promise be implied, which the statute of frauds says must be in writing to be valid? How do the cases differ? *The Bank of the United States v. Dandridge* (*supra*), which is a leading case upon the doctrine of the liability of a corporation aggregate, upon a promise implied, holds, as we have already said, that if the charter imposes restrictions upon the manner of contracting, they must be observed. And the California cases above cited, concede the same. It is plain, that if the restriction put upon municipalities by the legislature, for the purposes of reducing and limiting the incurring of debt and the expenditure of the public money, may be removed, upon the doctrine now contended for, there is no legislative remedy for the evils of municipal government, which of late have excited so much attention and painful foreboding. Restrictions and inhibition by statute are practically of no avail, if they can be brought to naught by the unauthorized action of every official of lowest degree, acquiesced in, or not repudiated, by his superiors. *Donovan v. The Mayor, etc.* (83 N. Y., 291), seems to be an authority in point, though the exact question now presented was not considered. And incidental remarks of DENIO, J., in *Peterson v. The Mayor* (17 N. Y., 449), are to the same purport. And see *Peck v. Burr* (10 N. Y., 294). The views here set forth, are not to be extended beyond the facts of the case. It may be, that where a municipality has come into the possession of the money or the property of a person, without his voluntary intentional action concurring therein, the law will fix a liability and imply a promise to repay or return it. Thus, money paid by mistake, money collected for an illegal tax or assessment; property taken and used by an official, as that of the city, when not so; — in such cases, it may be that the statute will not act as an inhibition. The statute may not be carried further than its intention, certainly not further than its letter. Its purpose is to forbid and prevent the making of contracts by unauthorized official agents, for supplies for the use of the corporation. This opinion goes no further than to hold, that where a person makes a contract with the city of New York for supplies to it, without the requirements

MC can't be
liable on implied
promise when
prescribes mode
of express promise

of the charter being observed, he may not recover the value thereof upon an implied liability.

The judgment should be affirmed.

All concur.

*Judgment affirmed.*¹

LITCHFIELD v. BALLOU.

1885. 114 U. S. 190.

This was a bill in chancery to enforce payment of moneys loaned to a municipality in violation of law, and for which it had been held that an action could not be maintained at law. *Buchanan v. Litchfield*, 102 U. S. 278. The facts making the case are stated in the opinion of the court.

John M. Palmer and *B. S. Edwards* for appellant.

D. T. Littler for appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a decree in chancery of the Circuit Court for the Southern District of Illinois.

The suit was commenced by a bill brought by Ballou against the city of Litchfield. Complainant alleges that he is the owner of bonds issued by the city of Litchfield to a very considerable amount. That the money received by the city for the sale to him of these bonds was used in the construction of a system of water works for the city, of which the city is now the owner. He alleges that one Buchanan, who was the owner of some of these bonds, brought suit on them in the same court and was defeated in his action in the Circuit Court and in the Supreme Court of the United States, both of which courts held the bonds void.

He now alleges that, though the bonds are void, the city is liable to him for the money it received of him, and as by the use of that money the water works were constructed, he prays for a decree against the city for the amount, and if it is not paid within a reasonable time to be fixed by the court, that the water works of the city be

¹ "To permit a recovery upon a *quantum meruit* solely for a work which can be done only by authority of a statute, would necessarily lead to the conclusion that a statute might be wholly ignored, and the county bound, provided it received the worth of its money.

"... The distinction must be kept in view between those cases which hold that a municipal corporation, which has received the benefit of money, labor, or property upon a contract made without due formality, and which is not prohibited by statute, is liable to the extent of the value of what has been received and appropriated, and those cases where the municipality has power to act only by virtue of a statute, and, in attempting to exercise the power, has failed to observe the statutory requirements. In the one class of cases the power to contract exists, while in the other the power to contract does not exist, because of the failure of the municipality to that which alone could give it such power." *ROBINSON, C. J., in Wrought-Iron Bridge Co. v. Board of Com'rs of Hendricks County*, Appellate Court of Indiana, A. D. 1898, 48 *Northeastern Reporter*, 1050, p. 1052. — ED.

Bonds previously held void

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sold to satisfy the decree. The bill also charges that he was misled to purchase the bonds by the false statements of the officers, agents and attorneys of the city, that the bonds were valid. Other parties came into the litigation, and answers were filed. The answer of the city denies any false representations as to the character of the bonds, denies that all the money received for them went into the water works, but part of it was used for other purposes, and avers that a larger part of the sum paid for the water works came from other sources than the sale of these bonds, and it cannot now be ascertained how much of that money went into the works.

The case came to issue and some testimony was taken, the substance of which is that much the larger part of the money for which the bonds were sold was used to pay the contractors who built the water works, while a very considerable proportion of the cost of these works was paid for out of taxation and other resources than the bonds.

There is no evidence of any false or fraudulent representations by the authorized agents of the city.

The bonds were held void in the case of *Buchanan v. Litchfield*, 102 U. S. 278, because they were issued in violation of the following provision of the Constitution of Illinois:

"ARTICLE IX.

"SECTION 12. No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness."

It was made to appear as a fact in that case, that at the time the bonds were issued the city had a pre-existing indebtedness exceeding five per cent. of the value of its taxable property, as ascertained by its last assessment for State and county taxes.

The bill in this case is based upon the fact that the *bonds are for that reason void*, and it makes the record of the proceedings in that suit an exhibit in this. But the complainant insists that, though the bonds are void, the city is bound, *ex aqua et bono*, to return the money it received for them. It therefore prays for a decree against the city for the amount of the money so received.

There are two objections to this proposition: 1. If the city is liable for this money, an action at law is the appropriate remedy. The action for money had and received to plaintiffs' use is the usual and adequate remedy in such cases where the claim is well founded, and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely, a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings.

*Most of bond
used for water
works & other
purposes*

*Bonds void
in excess of limit*

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@ at law proper

In this view the present bill fails for want of equitable jurisdiction.

2. But there is no more reason for a recovery on the implied contract to repay the money, than on the express contract found in the bonds.

The language of the Constitution is that no city, &c., "shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property." It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever.

If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law.

Counsel for appellee in their brief, recognizing the difficulty here pointed out, present their view of the case in the following language:

"The theory of relief assumed by the bill is, that notwithstanding the bonds were wholly invalid, and no suit at law could be successfully maintained either upon the bonds or upon any contract as such growing out of the bonds, yet as the City of Litchfield is in possession of the money received for the bonds, or, which is the same thing, its equivalent in property identified as having been procured with this money and having repudiated and disclaimed its liability in respect of the bonds, it must, upon well established equitable principles, restore to the complainants what it actually received, or at least so much of what it received as is shown now to be in its possession and in its power to restore."

If such be the theory of the bill, the decree of the court is quite unwarranted by it. The money received by the city from Ballou has long passed out of its possession, and cannot be restored to complainant. Neither the specific money nor any other money is to be found in the safe of the city or anywhere else under its control. And the decree of the court, so far from attempting to restore the specific money, declares that there is due from the City of Litchfield to complainants a sum of money, not that original money, but a sum equal in amount to the bonds and interest on them from the day of their issue. Is this a decree to return the identical money or property received, or is it a decree to pay as on an implied contract the sum received, with interest for its use?

As regards the water works, into which it is said the money was transmuted; if the theory of counsel is correct, the water works should have been delivered up to plaintiffs as representing their money, as property which they have purchased, and which, since the

Specific
cannot
be restored.

contract has been declared void, is *their property*, as representing their money. In this view the restoration to complainants of the property which represents their money puts an end to obligations on both sides growing out of the transaction. The complainants, having recovered what was theirs, have no further claim on the city. The latter having discharged its trust by returning what complainant has elected to claim as his own, is no longer liable for the money or any part of it.

Bill not run
any of
prop, but on

But here also the decree departs from what is now asserted to be the principle of the bill. Having decreed an indebtedness where none can exist, and declared that complainant has a lien on, not the ownership of, the water works, it directs a sale of the water works for the payment of this debt and the satisfaction of this lien.

If this be a mode of pursuing and reclaiming specific property into which money has been transmuted, it is a new mode. If the theory of appellee's counsel be true, there is no lien on the property. There is no debt to be secured by a lien. That theory discards the idea of a debt, and pursues the money into the property, and seeks the property, not as the property of the city to be sold to pay a debt, but as the property of complainant, into which *his* money, not the city's, has been invested, for the reason that there was no debt created by the transaction.

The money received on the bonds having been expended, with other funds raised by taxation, in erecting the water works of the city, to impose the amount thereof as a lien upon these public works would be equally a violation of the constitutional prohibition, as to raise against the city an implied assumpsit for money had and received. The holders of the bonds and agents of the city are *participes criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied assumpsit against a public policy so strongly declared.

Since other funds
also used for
waterworks improv-
n wt

But there is a reason why even this cannot be done.

Leaving out of view the question of tracing complainants' money into these works, it is very certain that there is other money besides theirs in the same property. The land on which these works are constructed was bought and paid for before the bonds were issued or voted. The streets through which the pipes are laid is public property into which no money of the complainants entered. Much, also, of the expense of construction was paid by taxation or other resources of the city. How much cannot be known with certainty, because, though the officers of the city testify that on the books a separate water-works account was kept, there is no evidence that the funds which went to build these works are traceable by those books to their source in any instance.

If the complainants are after the money they let the city have, they must clearly identify the money, or the fund, or other property which represents that money, in such a manner that it can be reclaimed and

To reclaim
It's

1) delivered without taking other property with it, or injuring other persons or interfering with others' rights.

It is the consciousness that this cannot be done which caused the court and counsel to resort to the idea of a debt and a lien which cannot be sustained. A lien of a person on his own property, which is and has always been his, in favor of himself, is a novelty which only the necessities of this case could suggest.

Another objection to this assertion of a right to the property is, that the bondholders, each of whom must hold a part of whatever equity there is to the property, are numerous and scattered, and the relative amount of the interest of each in this property could hardly be correctly ascertained. The property itself cannot be divided; its value consists in its unity as a system of water works for the city. Without the land and the use of the streets, the value of the remainder of the plant is gone. In these complainants can have no equity.

The decree of the court is reversed and the case remanded, with directions to dismiss the bill.

MR. JUSTICE HARLAN dissented.

TRAVELERS' INSURANCE COMPANY v. JOHNSON CITY. 142

1900. 99 Fed. 633.

Suit at law to recover from the defendant \$50,000 and interest from January 5, 1892, as money had and received to the use of the defendants; this amount having been paid by plaintiff to the Charleston, Cincinnati & Chicago R. R. to buy bonds of the defendant.¹

TAFT, Circuit Judge. . . . The question for our consideration here is, whether one who, for full value, purchases in the market negotiable bonds payable to bearer, and unindorsed, issued by a municipal corporation to a railroad company of another state, to whom it has no power to issue the bonds, in payment of a subscription to the company's stock to which it has no power to make a subscription, after the railroad has been built, and the depot has been constructed on the company's ground, and the certificates for the stock subscribed for have been delivered to the municipal corporation, all in accordance with the condition of the subscription agreement, may recover from the municipal corporation the money paid by it in open market for the bonds, on the ground that that amount has been expended in conferring upon the city the benefit of the railroad and the depot and the stock, when it further appears that the corporation has power to make sub-

¹ This short statement is substituted for that of the Reporter. Part of opinion omitted. — Ed.

scriptions for the stock of a domestic corporation, and to pay for the same in its bonds. We think the question must be answered in the negative. The cause of action is for money had and received to the use of the city. Such an action is based, not on an express or implied contract, but upon an obligation which the law supplies from the circumstances, because, *ex æquo et bono*, the defendant should pay for the benefit which he has derived at the expense of the plaintiff. It is an obligation which the law supplies, because, otherwise, it would result in the unjust enrichment of the defendant at the cost of the plaintiff. It is an obligation which arises only when the defendant has received money or property from the plaintiff and appropriated the same to his own use, either when he might have elected not to take it, or, having the power to do so, might return the benefit thus conferred to the plaintiff, and fails to do so. In this case the three benefits conferred on the plaintiff are: (1) The issuing of the stock; (2) the construction of the railroad; and (3) the building of the depot. As to the first, it has been conclusively adjudged by the supreme court of Tennessee in the case of *Johnson City v. Charleston, C. & C. R. Co.*, 100 Tenn. 138, 44 S. W. 670, in which the plaintiff and the defendants were adversary parties, that the city had no power to subscribe to the stock of the railroad company. This being so, the city did not become a stockholder in the railroad company, and did not receive the benefit of the stock purporting to be issued. The contract of subscription was utterly void, and the certificate was but waste paper. It imposed no obligation upon the railroad company or its stockholders; it conferred no benefit upon the city. The case of *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 193, leaves no doubt on this point. There a national bank, without power to do so under the national banking laws, purchased stock in a savings bank of the state of California. It was held that, in the absence of power to own the stock, the national bank did not become a stockholder, and was not liable to pay the assessment upon the stock for the benefit of creditors, although in that case it had received, and had not returned, dividends issued to it as a stockholder. The other benefits said to have been conferred upon the city were the construction of the railroad and the building of the depot. As the railroad and the depot were constructed on the land of the railroad company, they did not go into the possession of the city as its property. Had the railroad company, without any subscription by the city, built its railroad through the city, and erected its station there, it certainly could not be claimed that this would have given the railroad company a right of action against the city for the value of the benefits conferred on the city by such construction, however great those benefits might have been in adding to the prosperity of the city and its inhabitants. In the absence of an express agreement to pay for such a benefit, no tacit agreement to do so can be inferred. Where the conferring of the benefits was induced by an express agreement which is void, the law will not supply an obligation

No benefit

No recovery

*implied promise
but on unjust
enrichment*

to pay on the ground of unjust enrichment as a *quasi* contract, unless, in the absence of the express agreement, a real, but tacit, contract could have been inferred from the circumstances. The benefit indirectly conferred on one man's property by the improvement of the land of another is not an unjust enrichment of the other. Hence, *ex aequo et bono*, no obligation in law to pay for it arises. The case in hand is not distinguishable in principle from that of *Railroad Co. v. Bensley*, 6 U. S. App. 115, 2 C. C. A. 480, 51 Fed. 738, 19 L. R. A. 796, decided by this court, in which Mr. Justice Brown delivered the opinion. In that case the owners of lots in Chicago in close proximity to the lot on which it was proposed to construct the Chicago Board of Trade Building entered into a written contract with the owner of the lot by which they agreed that, if he would sell the lot to the board of trade at a low price, so as to induce the board of trade to buy it, and if the board of trade should construct its building thereon within a certain time, they would pay the owner of the lot, each of them, a certain sum of money. The owner of the lot accordingly sold it to the board of trade at the price named in the agreement, but the building was not constructed within the time fixed by the agreement. Suit was brought by the owner to recover from the contractors the amounts stipulated to be paid in the contract after the building had been constructed. The court held that time was of the essence of the contract, and was made a condition precedent to the obligation to pay, and that, therefore, no recovery could be had under the contract. The plaintiff then sought to recover on a *quantum valebat*, and it was held that the benefit conferred was not one which created an obligation on the part of the lot owners to pay, even though it appeared that, owing to the erection of the Board of Trade Building, they had been enabled to sell their land at a largely increased price. The court said :

" Had the defendant received a benefit from the performance of this contract to which he would not have been entitled had the contract not been made, the result might have been different; but, as a matter of fact, it received no benefit from the erection of this building which did not accrue to other owners of neighboring property who did not sign the contract or subscribe in aid of the purchase of the lot, and as to such persons it would not be claimed that liability arises. Its acquiescence in the completion of the building is immaterial, since it had no right to interfere. It is, then, only upon the basis of the special contract to pay that an action will lie, and this contract not having been performed by the plaintiff, there can be no recovery."

Mr. Justice Brown mentioned, as a most satisfactory case upon this point, *Railway Co. v. Thompson*, 24 Kan. 170, and said :

" This was an action upon certain bonds issued by the city of Parsons in aid of the construction of the plaintiff's road, and subject to a condition that the plaintiff should 'have its road constructed and in operation on or before the first day of July, 1878.' It was held that time was of the essence of this contract, and that the failure of the

Benefit indirectly conferred on one man's property by the improvement of the land of another is not an unjust enrichment of the other.

plaintiff to complete the road by the day named was fatal to a recovery, notwithstanding the road was completed shortly after that, and the city received the benefit of it. In delivering the opinion of the court, Mr. Justice Brewer, now of the Supreme Court of the United States, observed: 'Nor is this a case of part performance by one party and the acceptance by the other of the proceeds of such performance. The work done by the company was upon its own grounds. It owns the road absolutely and entirely. It has parted with nothing which the city has received. The city has accepted and appropriated none of its labor and none of its materials. It has received the benefit of the work in no other sense than every individual in the community, and in no other way than of one person receiving benefit from his neighbor's improvement of his own property.'"

While these were cases in which the plaintiff failed to recover on the express contract, not because it was *ultra vires* and void, but because the plaintiff failed to comply with a condition precedent in such contract, the principle upon which they were placed is entirely applicable to the case at bar. This is made apparent by the language of Mr. Justice Jackson in delivering the opinion in *Hedges v. Dixon Co.*, 150 U. S. 184-186, 14 Sup. Ct. 71, 37 L. Ed. 1044. There a county had issued bonds in aid of a railroad in excess of its authority, and the holders of the bonds filed a bill in which they asked from the court the relief of cutting down the obligation of the bonds proportionately so as to bring it within the lawful amount. The Supreme Court held that the relief could not be granted, and, referring to the cases of *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153, and *Read v. City of Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414, in which it had been permitted to bondholders of bonds issued without authority to recover from the municipal corporation issuing the bonds the amount of money received by it and expended by it for lawful purposes as money had and received to its use, the court said:

"The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising from the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or to say that it would be equal to such portion of the bonds in question as the county could lawfully have issued."

For these reasons we think that there is no ground upon which to base a recovery for money had and received to the use of Johnson City.

The cases relied upon by the plaintiff are *Read v. City of Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; *Chapman v. Douglass Co.*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Hitchcock v. Galveston*, 96 U. S.

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341, 24 L. Ed. 659. It is contended that they sustain the view that money paid for the benefit of the city on the faith of the issue of invalid bonds may be recovered in an action for money had and received. It will be found that, in every case cited but one, the city or county or municipal corporation which issued the bonds received the money or labor or material furnished, and that it was expended in improving the property of the city or other corporation in a manner in which the city had power to improve its own property. In *Hitchcock v. Galveston*, *supra*, the benefit conferred upon the city was the building of sidewalks, which the city had the right to build and pay for, but which, it was found, it had no right to pay by issuing bonds. In *Louisiana v. Wood* the money received for the bonds was used partly by the city in payment and redemption of matured bonds and coupons and warrants of the city, lawfully issued, and part of it was deposited in the city treasury. In *Parkersburg v. Brown*, which is the exception, the money which was received for the bonds was used to purchase land and to erect a manufacturing establishment, the operation of which it was supposed would benefit the city. The bonds were declared void for want of power in the city to aid private manufacturing establishments. The relief granted by the court was not to hold the city as for money had and received, but to follow the property into which the money had been put, and to sell the property, and distribute the net proceeds thereof to those with whose money the property had been purchased and improved. In *Chapman v. Douglass Co.*, *supra*, a county in Nebraska bought land upon which to erect a poor house and farm, and in payment therefor issued notes for four equal annual installments of the purchase price, and gave a mortgage to secure the payment of the notes. It was decided by the Supreme Court of the State that the county could not bind itself to pay the purchase money by notes, or to secure it by mortgage upon the property, but its power was limited to a payment in cash, and the levy of an annual tax to create a fund wherewith to pay the residue. It was held that, the contract being unauthorized only so far as it related to the time and mode of paying the purchase money, and the title to the land having passed by the conveyance, the county held the title as trustee for the benefit of the vendor, and that, unless the sum due on the purchase money was paid within a reasonable time, the county might be required to execute a deed releasing to the vendor all the title acquired under his deed. In *Read v. City of Plattsburgh*, the money paid for the bonds was used by the city of Plattsburgh in the construction of a high school building. The power of the city to issue bonds to build a high school was questioned, and by a subsequent act the bonds issued were validated by the legislature. At the time the bonds were issued it could not lawfully issue them in the amount in which they were issued. It was held that the city, having taken the money and put it into a school house, which it owned, was bound by the force of the transaction to repay to the purchaser of its void bonds the consider-

ation received and used by it, or its lawful equivalent, and that, therefore, the enabling act validating the bonds only recognized an existing moral and legal obligation, and was valid. It thus appears that in each of the cases, except Parkersburg v. Brown, the benefit received by the municipal corporation was money paid to it or property delivered into its actual possession under such circumstances that, had no express contract been attempted, a tacit contract might have been inferred. In Parkersburg v. Brown the money paid was followed, as in rem, into the thing bought with it.

It follows that the judgment of the court was correct, and it must be affirmed, with costs.¹

SPRINGFIELD FURNITURE CO. v. SCHOOL DISTRICT
NO. 4.

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1899. 67 Ark. 236.

COMPLAINT in equity to prevent a county treasurer from paying the furniture company for certain school desks.²

Wood, J. As the contract of purchase was made by only two directors, and not at a regular meeting, nor at a special meeting upon notice to the third director, it is not binding. School District v. Bennett, 52 Ark. 511. Likewise the warrants were also invalid. Nevertheless, under the circumstances, the school district was not in an attitude, at the time of filing its complaint, to repudiate the contract and refuse to pay for the desks. The proof shows that the district accepted the desks, and used twenty-six of them for about one year, and did not offer to rescind the contract and to return the desks until the bringing of this suit. The director Johnson testified that he "never knew anything about a contract having been made for about a week after it was done." The contract was entered upon June 23, 1896. The suit was brought June 30, 1897. The testimony of Johnson shows that he knew the desks had been received, and that a portion of them were being used in the schoolhouse. It is shown, therefore, that all the directors knew of the contract, and that the desks had been received, and were being used, yet no action was had by the board to annul the contract and cancel the warrants for more than a year. Such conduct must be taken as an acquiescence by the school district in the unauthorized contract made by two of its directors; for, all the directors having notice, the district is bound in the same manner and under the same

See also District
v. Bennett K.
Wood v. Bennett
School District v.
Bennett
K. not after suit.

¹ See also *Chelsea Sav. Bank v. Ironwood*, 130 Fed. 410.

² This short statement is substituted for the statement of facts by the court. — Ed.

rules as an individual would be bound. The contract was not ultra vires. Johnson, the only director not notified in the beginning, after having notice of what was done, took no steps, so far as this record discloses, to have the board rescind or repudiate the unauthorized act of the other two directors. "If a party calls upon a court of chancery to put forth its extraordinary powers, and grant him purely equitable relief, he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity." *Fosdick v. Schall*, 99 U. S. 253.

The school district cannot insist upon the relief sought. It has not even proposed to make compensation for the use of the property while in its possession. Nor did the chancellor impose any terms whatever as a condition for granting the relief prayed.

The decree is therefore reversed, and the complaint is dismissed here for want of equity.

BATTLE, J., not participating.

SECTION II. — *Liability for Torts.*

a. GENERAL PRINCIPLES OF LIABILITY.

RUSSELL v. THE MEN DWELLING IN THE COUNTY OF DEVON. /44

1788. 2 Term Reports (*Durnford & East*), 667.¹

THIS was an action upon the case against the men dwelling in the county of Devon, to recover satisfaction for an injury done to the waggon of the plaintiffs in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants, for themselves and the rest of the men dwelling in that county, appeared, and demurred generally.

Chambre, in support of the demurrer.

Gibbs, *contra*.

LORD KENTON, C. J. If this experiment had succeeded, it would have been productive of an infinity of actions. And though the fear of introducing so much litigation ought not to prevent the plaintiff's recovering, if by law he is entitled, yet it ought to have considerable weight in a case where it is admitted that there is no precedent of such an action having been before attempted. Many of the principles laid down by the plaintiff's counsel cannot be controverted; as that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair. But the question here is,

¹ Arguments omitted. — ED.

Whether this body of men, who are sued in the present action, are a corporation, or *quà* a corporation, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the Legislature for that purpose. But it has been said that this action ought to be maintained by borrowing the rules of analogy from the statutes of hue and cry: but I think that those statutes prove the very reverse. The reason of the statute of *Winton* was this; as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction,¹ till the statute gave that remedy; and most undoubtedly no such action could have been maintained against them before that time. Therefore when the case called for a remedy, the Legislature interposed; but they only gave the remedy in that particular case, and did not give it in any other case in which the neglect of the hundred had produced an injury to individuals. And when they gave the action, they virtually gave the means of maintaining that action; they converted the hundred into a corporation for that purpose: but it does not follow that, in this case where the Legislature has not given the remedy, this action can be maintained. And even if we could exercise a Legislative discretion in this case, there would be great reason for not giving this remedy; for the argument urged by the defendant's counsel, that all those who become inhabitants of the county, after the injury sustained and before judgment, would be liable to contribute their proportion, is entitled to great weight. It is true indeed that the inconvenience does happen in the case of indictments; but that is only because it is sanctioned by common law, the main pillar of which, as Lord *Coke* says, is unbroken usage. Among the several qualities which belong to corporations, one is, that they may sue and be sued; that puts it then in contradistinction to other persons. I do not say that the inhabitants of a county or hundred may not be incorporated to some purposes; as if the king were to grant lands to them, rendering rent, like the grant to the good men of the town of *Islington*.² But where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate: but if the county is to be considered as a corporation, there is no corporation fund out of which satisfaction is to be made. Therefore I think that this experiment ought not to be encouraged; there is no law or reason for supporting the action; and there is a precedent against it in *Brooke*: though even without that authority I should be of opinion that this action cannot be maintained.

ASHHURST, J. It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion

¹ *Vide ante*, 1 vol. 71. 2 *Wils.* 92, 3.

² *Dyer*, 100.

must have frequently happened. But it has been said that there is a principle of law on which this action may be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now if this action could be sustained, the public would suffer a great inconvenience; for if damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means whatever of reimbursing themselves; for if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy. However there is no foundation on which this action can be supported; and if it had been intended, the Legislature would have interfered and given a remedy, as they did in the case of hue and cry. Thus this case stands on principle: but I think the case cited from *Broke's Abridgement* is a direct authority to shew that no such action can be maintained; and the reason of that case is a good one, namely, because the action must be brought against the public.

BULLER, J., and GROSE, J., assented.

Judgment for the defendants.

ANTHONY v. ADAMS. 145

1840. 1 Met. (Mass.) 284.

SHAW, C. J. This is an action on the case to recover damages, for injuries to the plaintiff's lands by flowing, caused by the erection of an embankment by the agents of the defendants. It appears by the case that a highway was laid out, through the town of Adams, and that it crossed the Hoosic river, where it divided into two branches, and in such a manner, if it passed in a direct line, as to render two bridges necessary. To avoid this necessity, an embankment was made across one of these branches, and a cut made to turn the whole of the water into the other, and thus cause it to pass through one bridge only. This embankment was erected at a distance of eight or ten rods above the road, and on land not of the plaintiff's, but above his land; and the gravamen of the complaint is, that by the erection of this embankment, and by changing the direction of the watercourse from its natural bed, the plaintiff's lands were flooded and injured.

One question discussed was, whether an action sounding in tort would lie against a municipal corporation. We can have no doubt, that an action upon the case will lie against municipal corporations, when such corporations are in the execution of powers conferred on them, or in the performance of duties required of them by law, and their officers, servants and agents, shall perform their acts so carelessly, unskilfully or improperly, as to cause damage to others. This falls within the very general principle, that the superior or employer shall be answerable *civiliter* for the mismanagement and negligence of the agent employed by him, by which another is damnified. *Sutton v. Clarke*, 6 Taunt. 29. And although such action sounds in tort, to mark the distinction between this and an action upon contract; yet the true view of considering it, is that of a legal liability to indemnify another against negligence of one for whom the law holds him responsible. It implies no wilful act, or intended wrong, and, therefore, requiring no vote or corporate act to create the liability, it may as well lie against a corporation as an individual person. We think it stands on the same footing on which it is now held, both in this country and in England, contrary to the ancient notions on that subject, that corporations may be liable on implied promises raised by law from their legal liabilities. *Gray v. Portland Bank*, 3 Mass. 364. *Bank of Columbia v. Patterson*, 7 Cranch, 299. *Clark v. Mayor, &c. of Washington*, 12 Wheat. 40. *Beverley v. Lincoln Gas Light and Coke Co.*, 6 Adolph. & Ellis, 829. But where individuals, although professing to act under color of authority from municipal corporations, do acts which are injurious to others, if the objects and purposes which they propose to accomplish, are not within the scope of the corporate powers of towns, and not done in the execution of any corporate duty imposed upon the town by law, the town is not liable for the damages occasioned by such acts. Were it otherwise, towns might be rendered responsible upon implied liabilities, in cases where they could not bind themselves, as a corporation, by an express vote of the inhabitants. For, it is now well settled that a town, in its corporate capacity, will not be bound, even by the express vote of a majority, to the performance of contracts, or other legal duties not coming within the scope of the objects and purposes for which they are incorporated. *Stetson v. Kempton*, 13 Mass. 272. *Norton v. Mansfield*, 16 Mass. 48. *Parsons v. Goshen*, 11 Pick. 396.

Looking at the declaration in the present case, it is not shown that the town was under any obligation, in its corporate capacity, to erect and build this highway, or that the dam complained of was a part of the highway, or that the damage complained of resulted from the negligence of the agents and officers of the town, in the performance of any corporate duty. The court are, therefore, of opinion that the action cannot be maintained.

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HILL v. BOSTON.

1877. 122 Mass. 344.

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*Injury Caused
by Negligent Construction
of School Building*

GRAY, C. J.¹ This is an action of tort against the city of Boston. The plaintiff, who sues by his next friend, offered to prove at the trial that in May, 1874, he was of the age of eight years, and was a pupil attending a school in Boston, which was one of the public schools which the city was bound by law to keep and maintain; that this school was on the third floor of the building in which it was kept; that the staircase was winding, and the railing thereof so low as to be dangerous; that the city negligently constructed and maintained the building, and authorized the public schools to be kept therein; and that the plaintiff, while going to school, and being in the exercise of due care, fell over the railing of the second flight of stairs, and was seriously injured.

We had supposed it to be well settled in this Commonwealth that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage. But, it having been suggested at the argument that the recent opinions of the Supreme Court of the United States tended to a different result, the respect due to that high court, even in matters in which we are not bound by its decisions, has led us to reexamine the foundations upon which our law rests; and, in stating our conclusion, to make fuller reference to the authorities than might under other circumstances have been thought expedient.

The question has most commonly arisen in actions for defects in highways and bridges, by reason of which persons passing over them have received injuries.

Although the English books contain numerous cases of indictments or informations for neglect to repair highways and bridges, no instance has been referred to, in the frequent discussions of the subject in England and in this country, in which an English court has sustained a private action against a public or municipal corporation or quasi corporation for such neglect, except under a statute expressly or by necessary implication giving such a remedy.

The towns and cities of Massachusetts have been established by the Legislature for public purposes and the administration of local affairs, and embrace all persons residing within their respective limits.

¹ Part of the opinion omitted. — Ed.

At the first settlement of the Colony, towns consisted of clusters of inhabitants dwelling near each other, which, by the effect of legislative acts, designating them by name, and conferring upon them the powers of managing their own prudential affairs, electing representatives and town officers, making by-laws, and disposing, subject to the paramount control of the Legislature, of unoccupied lands within their territory, became in effect municipal or *quasi* corporations, without any formal act of incorporation. *Porter v. Sullivan*, 7 Gray, 441, 444. *Commonwealth v. Roxbury*, 9 Gray, 451, 485. *West Roxbury v. Stoddard*, 7 Allen, 158, 169. *Lynn v. Nahant*, 113 Mass. 433, 448. By some of the earliest acts passed under the Province Charter, the boundaries of all existing towns were confirmed, and towns were empowered to assess and levy taxes for the maintenance and support of schools and of the poor, and the defraying of other necessary charges arising within the towns, and were declared to be capable of suing and being sued. Prov. Sts. 1692-93 (4 W. & M.) c. 28; 1694-95 (6 W. & M.) c. 13; 1 Prov. Laws (State ed.) 64, 66, 182; Anc. Chart. 247, 249, 279. Soon after the adoption of the Constitution of the Commonwealth, it was for the first time expressly enacted that "the inhabitants of every town within this government are hereby declared to be a body politic and corporate." St. 1785, c. 77, § 8. Rev. Sts. c. 15, § 8. Gen. Sts. c. 18, § 1. And it has always been recognized by this court, even before it was declared by statute, that towns, as well as counties, territorial parishes and school districts, by virtue of their existence as *quasi* corporations, were capable of holding property and making contracts for the purposes for which they were established. *Windham v. Portland*, 4 Mass. 384, 389. *Rumford School District v. Wood*, 13 Mass. 193, 198. *First Parish in Sutton v. Cole*, 3 Pick. 282, 240. Rev. Sts. c. 15, § 11, and Commissioners' note. Gen. Sts. c. 18, § 9.

By the common law of Massachusetts and of other New England States, derived from immemorial usage, the estate of any inhabitant of a county, town, territorial parish or school district, is liable to be taken on execution on a judgment against the corporation. 5 Dane Ab. 158. *Hawkes v. Kennebeck*, 7 Mass. 461, 463. *Chase v. Merri-mack Bank*, 19 Pick. 564, 569. *Gaskill v. Dudley*, 6 Met. 546. *Beardsley v. Smith*, 16 Conn. 368. In this Commonwealth, payment of such a judgment has never been compelled by mandamus against the corporation, as in other parts of the United States. Dillon on Mun. Corp. (2d ed.) §§ 446, 686. *Supervisors v. United States*, 4 Wall. 485.

From a very early period, towns have been, by general laws, required to keep highways and bridges in repair, and made liable to actions for defects therein by persons sustaining special damage in their persons or property. Mass. Col. St. 1648, 2 Mass. Col. Rec. 229; Mass. Col. Sts. (ed. 1672) 12. Prov. St. 1693-94 (5 W. & M.) c. 6, §§ 1, 6; 1 Prov. Laws (State ed.) 186, 187. Anc. Chart. 55, 56

267, 269. St. 1786, c. 81, §§ 1, 7. Rev. Sta. c. 25, §§ 1, 22. St. 1850, c. 5. Gen. Sta. c. 44, §§ 1, 22. The case of *Horton v. Ipswich*, 12 Cush. 488, cited for the plaintiff, was an action upon such a statute.

In a case in this court in 1810, in which an action was maintained against a corporation chartered to maintain a canal and to take tolls thereon, for suffering its canal to be out of repair, whereby the plaintiff's raft stuck fast and was injured, Parsons, C. J., said, that although quasi corporations, such as counties and hundreds in England, and counties and towns in this state, were liable to information or indictment for a neglect of a public duty imposed on them by law, yet it was settled in the case of *Russell v. Men of Devon*, 2 T. R. 667, that no private action could be maintained against them for a breach of their corporate duty, unless such action was given by statute. *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169, 187.

Two years later, the question was directly presented for judgment, in an action at common law against a town for a personal injury caused by a defect in a highway, of which the town had not had the notice required to charge it under the statute. It was argued for the plaintiff, that none of the objections which prevailed in *Russell v. Men of Devon* applied, because here the town was a corporation created by statute, capable of suing and being sued, was bound by statute to keep the public highways in repair, was called upon to answer only for its own default, and had a treasury out of which judgments recovered against it might be satisfied; and that the objection that a multiplicity of actions would be the consequence of levying the execution on one or more inhabitants of the town could have no effect, because it would equally apply to every action against a town or parish, and yet such actions were every day brought and supported. But the court arrested judgment, saying: "It is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But quasi corporations, created by the Legislature for purposes of public policy, are subject, by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute." *Mower v. Leicester*, 9 Mass. 247, 250.

Those cases have ever since been considered as having established in this Commonwealth the general doctrine that a private action cannot be maintained against a town or other quasi corporation, for a neglect of corporate duty, unless such action is given by statute. *White v. Philipston*, 10 Met. 108, 110. *Sawyer v. Northfield*, 7 Cush. 490, 494. *Bigelow v. Randolph*, 14 Gray, 541, 543. And they have been approved and followed throughout New England. *Adams v. Wiscasset Bank*, 1 Greenl. 361, 364. *Reed v. Belfast*, 20 Maine, 246, 248. *Farnum v. Concord*, 2 N. H. 392. *Eastman v. Meredith*, 36 N. H. 284, 297-300. *Hyde v. Jamaica*, 27 Vt. 443, 457. *State v. Burling-*

ton, 36 Vt. 521, 524. *Chidsey v. Canton*, 17 Conn. 475, 478. *Taylor v. Peckham*, 8 R. I. 349, 352.

In this Commonwealth, an act of the Legislature changing a town into a city has never been considered as enlarging civil remedies for neglect of corporate duty; and it has been constantly held that a city, like a town, is not liable to an action for a defect in a highway, except so far as the right to maintain such an action has been clearly given by statute. *Brady v. Lowell*, 3 Cush. 121. *Harwood v. Lowell*, 4 Cush. 310. *Hixon v. Lowell*, 13 Gray, 59, 64. *Oliver v. Worcester*, 102 Mass. 489. The same view has been taken in other New England States, and in New Jersey, Michigan and California. *Morgan v. Hallowell*, 57 Maine, 375, 378. *Jones v. New Haven*, 34 Conn. 1, 13. *Hewison v. New Haven*, 37 Conn. 475. *Pray v. Jersey City*, 3 Vroom, 394. *Detroit v. Blackeby*, 21 Mich. 84. *Winbigler v. Los Angeles*, 45 Cal. 36.

Neither the act which originally established the city of Boston, St. 1821, c. 110, nor the act to revise the city charter, St. 1854, c. 448, contains any provision as to the duty of the city to repair highways, or to provide school-houses. Each of these duties depends upon general laws, applicable to all cities and towns alike. As to highways, the duty is regulated by the Gen. Sts. c. 44, §§ 1, 21, 22. The duty as to school-houses is governed by the Gen. Sts. c. 38, § 36, which enact that "every town, not divided into school-districts, shall provide and maintain a sufficient number of school-houses, properly furnished and conveniently located, for the accommodation of all the children therein entitled to attend the public schools." This enactment, by virtue of c. 3, § 7, cl. 17, includes cities as well as towns. The only remedy which the statutes give for refusal or neglect to comply with its requisitions is by indictment. St. 1871, c. 145.

Assuming, therefore, that the form of the staircases of school-houses is not left exclusively to the discretion of the city, and that the negligence offered to be proved at the trial might be a cause of indictment, it is quite clear that, according to the statutes and decisions in this Commonwealth, it affords no ground of private action against the city. But it may be convenient, in this connection, to distinguish some of the principal cases in which this court has held cities liable to actions of tort by individuals.

If a city or town negligently constructs or maintains the bridges or culverts in a highway across a navigable river, or a natural water-course, so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort, to the same extent that any corporation or individual would be liable for doing similar acts. *Anthony v. Adams*, 1 Met. 284, 285. *Lawrence v. Fairhaven*, 5 Gray, 110. *Perry v. Worcester*, 6 Gray, 544. *Parker v. Lowell*, 11 Gray, 358. *Wheeler v. Worcester*, 10 Allen, 591. So if a city, by its agents, without authority of law, makes or empties a common sewer upon the property of another to his injury, it is liable to him in an action of tort.

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Proprietors of Locks & Canals v. Lowell, 7 Gray, 223. *Hildreth v. Lowell*, 11 Gray, 345. *Haskell v. New Bedford*, 108 Mass. 208. But in such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside of the limits of the public work.

As to common sewers, built by municipal authorities under a power conferred by law, it has been held, upon great consideration, that, as the power of determining where the sewers shall be made involves the exercise of a large and quasi judicial discretion, depending upon considerations affecting the public health and general convenience, therefore no action lies for a defect or want of sufficiency in the plan or system of drainage adopted within the authority so conferred; but that, as the sewer acts were not made applicable to any city, unless accepted by it, and, when accepted, and the sewers built, vested in the city the property in the sewers, and authorized it to assess the expense of construction upon the lands immediately benefited, and as the duty of constructing the sewers and keeping them in repair was merely ministerial, therefore, for neglect in the construction or repair of any particular sewer, whereby private property was injured, an action might be maintained against the city. Gen. Sts. c. 48. Sts. 1841, c. 115; 1857, c. 225; 1869, c. 111. *Child v. Boston*, 4 Allen, 41. *Emery v. Lowell*, 104 Mass. 13. *Merrifield v. Worcester*, 110 Mass. 216.

The only other cases in Massachusetts, which need be mentioned, are those in which a city, holding and dealing with property as its own, not in the discharge of a public duty, nor for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a private owner might, has been held liable, to the same extent as he would be, for negligence in the management or use of such property to the injury of others. *Thayer v. Boston*, 19 Pick. 511. *Oliver v. Worcester*, 102 Mass. 489. The distinction between acts done by a city in discharge of a public duty, and acts done for what has been called, by way of distinction, its private advantage or emolument, has been clearly pointed out by two eminent judges, while sitting in the supreme courts of their respective states, who have since acquired a wider reputation in the Supreme Court of the Union, and by the present Chief Justice of England. Nelson, C. J., in *Bailey v. Mayor, &c. of New York*, 3 Hill, 531, 539. Strong, J., in *Western Saving Fund Society v. Philadelphia*, 31 Penn. St. 185, 189. Cockburn, C. J., in *Scott v. Mayor, &c. of Manchester*, 2 H. & N. 204, 210.

The English authorities uniformly hold that a county, town or parish being liable at common law to indictment only, and not to action, for neglect to repair a highway, therefore, when the duty to repair, which before rested upon the county, town or parish is transferred

by statute to a public officer, or to a municipal corporation or a board incorporated for the purpose, such officer or corporation is no more liable to private action than the county, town or parish previously was, unless the statute transferring the duty clearly manifests an intention in the Legislature to impose the additional liability.

The result of the English authorities is, that when a duty is imposed upon a municipal corporation for the benefit of the public, without any consideration or emolument received by the corporation, it is only where the duty is a new one, and is such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect in its performance is to be presumed.

The result of this review of the American cases may be summed up as follows: There is no case, in which the neglect of a duty, imposed by general law upon all cities and towns alike, has been held to sustain an action by person injured thereby against a city, when it would not against a town. The only decisions of the state courts, in which the mere grant by the Legislature of a city charter, authorizing and requiring the city to perform certain duties, has been held sufficient to render the city liable to a private action for neglect in their performance, when a town would not be so liable, are in New York since 1850, and in Illinois. The cases in the Supreme Court of the United States, in which private actions have been sustained against a city for neglect of a duty imposed upon it by law, are of two classes: 1st. Those which arose under the peculiar terms of special charters, in the District of Columbia, as in *Weightman v. Washington* and *Barnes v. District of Columbia*, or in a territory of the United States, as in *Nebraska City v. Campbell*. 2d. Those which, as in *Mayor, &c. of New York v. Sheffield*, and *Chicago City v. Robbins*, arose in New York or in Illinois, and in which the general liability of the city was not denied or even discussed, and apparently could not have been, consistently with the rule by which the Supreme Court of the United States, upon questions of the construction and effect of the Constitution and statutes of a state, follows the latest decisions of the highest court of that state, even if like words have been differently construed in other states. *Elmendorf v. Taylor*, 10 Wheat. 152, 159. *Christy v. Pridgeon*, 4 Wall. 196. *Richmond v. Smith*, 15 Wall. 429. *Tioga Railroad v. Blossburg & Corning Railroad*, 20 Wall. 137. *State Railroad Tax Cases*, 92 U. S. 575, 615. In the absence of such binding decisions, we find it difficult to reconcile the view, that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of the duties thereby imposed upon it, with the doctrine that the purpose of the creation of municipal corporations by the state is to exercise a part of its powers of government—a doctrine universally recognized, and

which has nowhere been more strongly asserted than by the Supreme Court of the United States, in the opinions delivered by Mr. Justice Hunt, in *United States v. Railroad Co.* 17 Wall. 322, 329, and by Mr. Justice Clifford, in *Laramie v. Albany*, 92 U. S. 307, 308.

But, however, it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty, which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the Commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone, and a breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby; and, according to the terms of the report, there must be

Judgment for the defendant.

WALCOTT v. INHABITANTS OF SWAMPSCOTT. 147

1861. 1 Allen (Massachusetts), 101.

TORT for an injury received upon a highway from a collision with a cart driven by one O'Grady, a laborer employed by a highway surveyor of Swampscott to aid in repairing a highway. At the trial in the superior court, upon the facts proved, the defendants requested the court to rule that they were not liable for the acts of O'Grady; but Wilkinson, J. instructed the jury that if O'Grady was driving the horse and cart with which the plaintiff came in collision, with a load of gravel for the repair of the highway, and was employed so to do by the surveyor of the town, and the collision was caused solely by O'Grady's want of care in driving the horse and cart, the defendants were liable. A verdict was found for the plaintiff, and the defendants alleged exceptions.

J. A. Gillis, for the defendants.

J. W. Perry, (*A. B. Almon* with him,) for the plaintiff.

BIGELOW, C. J. We cannot distinguish this case from *Hafford v. City of New Bedford*, 16 Gray, 297. It was there held, that where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of its inhabitants or of the community, such officer cannot be regarded as the servant or agent of the town, for whose negligence or want of skill in the performance of his duties a town or

city can be held liable. To the acts and conduct of an officer so appointed or elected the maxim *respondet superior* is not applicable.

This is especially true in the case of surveyors of highways. They are elected by towns and cities, not because they are to render services for their peculiar benefit or advantage, but because this mode of appointment has been deemed expedient by the legislature in the distribution of public duties and burdens for the purposes of government, and for the good order and welfare of the community. They are, strictly speaking, public officers, clothed with certain powers and duties which are prescribed and regulated by statute. Towns cannot direct or control them in the performance of these duties; they cannot remove them from office during the term for which they are chosen; they are not amenable to towns for the manner in which they discharge the trust reposed in them by law; nor can towns exercise any right of selecting the servants or agents by whom they perform the work of repairing the highways. In the discharge of these general duties they are wholly independent of towns, and can in no sense be considered their servants or agents. It is only in certain specified cases, and under carefully guarded limitations, that they can bind towns by their acts. Rev. Sts. c. 25, §§ 13, 15. Gen. Sts. c. 44, §§ 11, 13, 14. *Sikes v. Hatfield*, 13 Gray, 347. It was decided by this court, in *White v. Phillipston*, 10 Met. 108, that the common rule of law, which makes the agent or servant liable over to his employer or master for damages sustained by him in consequence of the neglect of such agent or servant, does not apply to the acts of a surveyor of highways. The court there say he is not treated by the statute as a mere agent or servant whom the town has employed, and to whom he is responsible for neglect of duty. No one would pretend that a town would be liable for damages occasioned by the negligence or want of care of one of its inhabitants while engaged in working out the amount of his highway tax by making repairs on the roads. And yet we cannot see why such liability would not exist if the surveyor of highways, or the persons employed by him, can render the town chargeable for acts of carelessness while employed in performing similar labor. The truth is, that in neither case does the relation of principal and agent or master and servant exist.

In the case at bar, the injury sustained by the plaintiff was not occasioned by any negligence or want of care on the part of the surveyor himself, but by the carelessness of a person employed by him to make repairs on the road. To sustain this action, therefore, it would be necessary to hold that the defendants were liable not only for the acts of a public officer, but also for those of a person in his employment whom they did not select, and in whose employment to act in their behalf they could have no voice. This would be a clear violation of the principle, that the right of selection lies at the foundation of the liability of a master for the acts of his servant. The law does not hold parties responsible for the negligence or want of skill of those over whose selection and employment they could exercise no direction or control.

Exceptions sustained.

MURRAY v. OMAHA. 148

1902. 66 Neb. 279.

POUND, C. This is an action against the city of Omaha and the members of the board for the inspection of buildings, appointed under its charter, to recover for the alleged wrongful tearing down of certain frame buildings condemned by the board as nuisances under provisions of a municipal ordinance. The principal contest was as to the liability of the city, and as no other question is argued in the plaintiff's briefs, we are concerned with that aspect of the case only. Section 36 of the act of 1893¹ for the government of cities of the metropolitan class, which was in force at the time of the occurrence out of which this case arose, gave the mayor and council power to provide for fire-limits; to provide for the removal of buildings erected contrary to fire-limit regulations; to provide that buildings within such limits, which had become dangerous by reason of decay, be removed, and to assess the cost of removal upon the land, or to collect it from the owner personally. While the language used is somewhat ambiguous, taken in connection with section 107 of the same act, we think it was intended to give the mayor and council power to provide general rules upon these subjects by ordinance. Section 107 provided that in every city of the metropolitan class there should be a board for the inspection of buildings, which should "have charge of the enforcing of all ordinances pertaining to party walls, or the erection, construction, alteration, repair, or removal of buildings." In other words, the power to make rules on such subjects was left to the city; the power to apply, execute and enforce them was intrusted to this board. The statute also provided that the principal and executive officer of the board should be an inspector of buildings, and the city authorities, evidently construing the statute as we have done, provided, in the ordinances shown in evidence, certain general rules for carrying out the powers given by section 36, and left their execution to that officer. The contention of the plaintiff is that the provisions of the ordinance as to the mode of procedure in removing a dangerous building were not strictly adhered to, and that for such reason the defendants became liable. A verdict for the defendants was directed in the trial court, and the plaintiff has come here by petition in error.

We are of opinion that the city was not liable for the manner in which the board for the inspection of buildings exercised its office. The execution of laws and ordinances as to the erection, repair and removal of buildings was given expressly, not to the city, but to this

¹ Compiled Statutes, 1893, ch. 12 a.

board. The board was not under the control of the city government, but exercised its own discretion. It could not be ordered to condemn or remove this or that building. All the city could do was to enact ordinances providing general rules. When these were enacted, their execution and application was left to the board. The city did not enforce them. As the board was the creature of the statute, and exercised powers derived from the state, not from the city, we do not see how it can be said to represent the municipality so as to make the latter liable for its wrongful acts. The individual members are the persons to proceed against, not the city. As a general rule, a municipal corporation is not liable for the torts of an independent board, constituted by the charter or by general law to perform some public service from which the municipality derives no special advantage in its corporate capacity, even though the duties imposed on such board might have been imposed upon the municipality, and its members are appointed by the municipal government under the provisions of the charter or law. 1 Beach, Public Corporations, sec. 740; Williams, Municipal Liability for Tort, secs. 16, 17; 20 Am. & Eng. Ency. Law [2d ed.], 1203. In such case the board represents the state and exercises its sovereignty; it is not an agent of the municipality. That the duties confided to the board in question were for the interest of the general public and might equally well have been left to a board appointed by the state government, or even to a state officer, is illustrated by other provisions in our laws. Not to mention the various statutes which are or have been in force providing for appointment of fire and police commissions by the governor, and giving such boards extensive powers in municipal affairs, section 15, chapter 30, Compiled Statutes,¹ 1901, puts the execution of the laws as to fire-escapes in the hands of the state. This is a matter of general public concern of the same nature as the condemnation and removal of dangerous, decayed and inflammable structures; and it is obvious that in either case the police power of the state is exercised, and the authority which the state sets up to wield that power represents the sovereignty of the state. Such has been the general course of decision with respect to boards so constituted. *Bryant v. City of St. Paul*, 83 Minn. 289, 23 N. W. Rep. 220; *McGinnis v. Inhabitants of Medway*, 176 Mass. 67, 57 N. E. Rep. 210; *Gilboy v. City of Detroit*, 115 Mich. 121, 73 N. W. Rep. 128; *Mead v. City of New Haven*, 40 Conn. 72, 16 Am. Rep. 14. In *Bryant v. City of St. Paul*, — a case in which responsibility for the acts of a board of health, composed of the city engineer, city physician and four members of the city council, was in question, — the court said: "The duties of such officers are not of that class of municipal or corporate duties with which the corporation is charged in consideration of charter privileges, but are police or governmental functions, which could be discharged equally well through agents appointed

¹ Cobbe, Annotated Statutes, sec. 6359.

by the state, though usually associated with and appointed by the municipal body. The nature of the duties as public are the same in either case." In *McGinnis v. Inhabitants of Medway, supra*, it was held that the municipality was not liable for the acts of a liquor-licensing board consisting of the selectmen of a town. In *Mead v. City of New Haven, supra*, the city, under power conferred by its charter, appointed an inspector of steam boilers and provided through a by-law that no one should use such a boiler until it had been tested by the inspector. It was held that the city was not liable for negligence of such inspector, the court saying: "The city must, we think, be regarded as the agent of the government, and acting for the state and not for itself in making the appointment of inspectors, and therefore not liable for the inspector's negligence." It can make no difference that the board was charged with the enforcement of municipal ordinances. The same is true of police commissions, excise boards, boards of health, and the like, as to which it is settled no liability attaches to the municipality. The ordinances which the board was constituted to carry out were enacted under authority of the state in furtherance of the police power of the state. The matters provided for might have been covered by general statute, and put in charge of general state officers, had the legislature so preferred.

It is contended that the city should be held for the reason that it afterwards ratified and adopted the wrongful acts of the board. The acts in question were not within the scope of the authority of the general municipal officers, and we do not see how they could do by ratification what the statute confided to other and independent officers. The enforcement of building ordinances was for the board, not the city, and the city could not enforce them by adoption or ratification, any more than in the first instance. *Calwell v. City of Boone*, 51 Ia. 687, 2 N. W. Rep. 614, 33 Am. Rep. 154; *Peters v. City of Lindaborg*, 40 Kan. 654, 20 Pac. Rep. 490. In *City of Omaha v. Croft*, 60 Nebr. 57, the acts complained of were in the line of the city's authority, and done by virtue of an ordinance providing therefor. The city had the power to do them in the first instance, and could ratify and adopt them when done by others.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

Affirmed.

WHEELER v. GILSUM. 149

1905. 73 N. H. 429.

CASE, for negligence, March 2, 1902, the plaintiff owned and occupied a sawmill on the bank of the Ashuelot river. On that day an ice jam in the river above the mill caused the water of the stream, increased by surface water accumulating from rain and melted snow, to overflow a highway in the town of Gilsum, preventing travel thereon. A highway agent of the town, under the direction and control of one of the selectmen, went upon the river outside the highway and attempted to break up the ice with dynamite, so that the water might drain off from the highway. The work was negligently done, with the result of increasing the water in the highway above the jam and of weakening the ice so that it subsequently broke up, and the water and ice flooded, crushed, carried away, and practically destroyed the plaintiff's mill. The town, through its officers and citizens, had notice of, and could have removed, the danger to the plaintiff's property created by the negligent attempt to break up the ice. The expense of what was done was paid by the town. The plaintiff was without fault.

After the opening statement by plaintiff's counsel of the grounds upon which recovery was claimed, in substance as above set forth, a nonsuit was ordered, and the plaintiff excepted. Transferred from the October term, 1904, of the superior court by *Peaslee, J.*

PARSONS, C. J. In repairing the highway under the direction of the selectmen (Laws 1897, c. 67, s. 1), the highway agent was a public officer, for whose negligent acts in the performance of his duty the town is not liable. *O'Brien v. Derry*, 73 N. H. 198; *Hall v. Concord*, 71 N. H. 367; *Downes v. Hopkinton*, 67 N. H. 456; *Wakefield v. Newport*, 62 N. H. 624; *Grimes v. Keene*, 52 N. H. 330.

The principle under which a town may be liable for an injury to private property rights by an abuse of its possessory right in the highway—permitting an unreasonable use of the land to the injury of another (*Clair v. Manchester*, 72 N. H. 231; *Flanders v. Franklin*, 70 N. H. 168; *Gilman v. Laconia*, 55 N. H. 130)—has no application. The plaintiff's injury was not occasioned by an unreasonable use of the town's property right, made or permitted by the town. The dangerous condition in the river was due to natural causes, or to their action combined with the negligence of public officers. These causes created a nuisance which threatened alike the property of the town and that of the plaintiff. The nuisance was not within the highway, nor was it connected therewith in any way. It did not consist in anything appurtenant to the highway, which the town used for the benefit of its highway property, though without the limits of the highway. If the town could rightfully go without the limits of the

highway to abate the nuisance created by the elements and the action of the highway agent, which threatened injury to its highway property, and would be liable to the plaintiff for an injury resulting from a negligent exercise of such right by the town, the power to abate such nuisance was merely a right which the town had for its own benefit — not a duty imposed upon it for the benefit of the plaintiff. As no duty rested with the town to act for the protection of the plaintiff, its failure merely to take action is not actionable negligence. *Buch v. Company*, 69 N. H. 257; *McGill v. Granite Co.*, 70 N. H. 125.¹

Exception overruled.

All concurred.

MILLS v. CITY OF BROOKLYN. 150

1865. 32 New York, 489.²

DENIO, C. J. . . . The grievance of which the plaintiffs complain, is that sufficient sewerage to carry off the surface water from their lot and house has not been provided. A sewer of a certain capacity was built, but it was insufficient to carry off all the water which came down in a rain storm, and the plaintiffs' premises were, to a certain extent, unprotected. Their condition was certainly no worse than it would have been if no sewer at all had been constructed. So far as the one laid down operated, it relieved the plaintiffs' lot; but the relief was not adequate. If the defendants would have been liable if they had done nothing, they are of course liable for the insufficient character of the work which was constructed.

But it is not the law that a municipal corporation is responsible in a private action for not providing sufficient sewerage for every, or for any part of the city or village. The duty of draining the streets and avenues of a city or village, is one requiring the exercise of deliberation, judgment and discretion. It cannot, in the nature of things, be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequence of water falling from the clouds upon it. This duty is not, in a technical sense, a judicial one, for it does not concern the administration of justice between citizens; but it is of a judicial nature, for it requires, as I have said, the same qualities of deliberation and judgment. It admits of a choice of means, and the determination of the order of time in which improvements shall be made. It involves, also, a variety of prudential considerations relating to the burdens which may be discreetly imposed at a given time, and the preference which one locality may claim over

¹ See *Bulger v. Eden*, 82 Me. 352, 19 Atl. 820, 9 L. R. A. 205; *Murphy v. Needham*, 176 Mass. 422, 57 N. E. 689.

² Statements and arguments omitted; also portions of opinion. — Ed.

another. If the owner of property may prosecute the corporation on the ground that sufficient sewerage has not been provided for his premises, all these questions must be determined by a jury, and thus the judgment which the law has committed to the city council, or to an administrative board, will have to be exercised by the judicial tribunals. The court and jury would have to act upon a partial view of the question, for it would be impossible that all the varied considerations which might bear upon it could be brought to their attention in the course of a single trial. Such a system of law would be as vexatious in practice as it is unwarranted in law. It has been frequently invoked, but never, I believe, with success.

It may, therefore, be laid down as a very clear proposition, that if no sewer had been constructed at the locality referred to, an action would not lie against the corporation, though the jury should find that one was necessary, and that the defendants were guilty of a dereliction of duty in not having constructed one.

Σ no sewer constructed

But the defendants put down a sewer which was insufficient to carry off all the surface water which fell during a violent shower. There was no want of skill in constructing it; simply it was not sufficiently large. The evidence was that it could not have been made larger on account of the grade and size of the system of sewers with which it connected, and through which the water had to be carried off. The evidence as to this was entirely uncontradicted; and there was nothing intrinsically improbable in the assertion. Unless the defendants were responsible for the want of judgment upon which that system was devised, I do not see why this evidence was not a complete answer to the action; and that they were not responsible for that, follows from what has already been said. Very many considerations besides the protection of the land upon which the plaintiffs' house was erected, no doubt entered into the question when that system was determined upon. It is inferable from the evidence that the plaintiffs' land was then vacant and unimproved, and that the adjacent streets had not been graded. While that state of things existed it was seen that the surface water was absorbed by the earth, and injured no one. No doubt public improvements, in a growing town, ought to be made with a certain reference to anticipated changes. But it would require a degree of wisdom and foresight not usually met with in public officers, to adjust and apply the expenditures for public purposes so perfectly that no deficiency or redundancy would ever be found to exist. It is a wise provision of the law that an action for damages does not lie for such errors of judgment on the part of the agents of the public.

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[Certain authorities referred to] are all cases where the injury was either the result of suffering a municipal work to be out of repair, or where the defendants had done acts which were in themselves positive nuisances. They furnish no ground for holding a municipal corpora-

tion responsible for not providing suitable sewerage, whether the neglect was total, or partial only, arising from the insufficiency of a sewer to discharge all the water which it was intended to carry off.

The questions in this case were raised by the motion to dismiss, on account of the insufficiency of the complaint, which did not, according to the foregoing views, set forth a cause of action, and by one of the points taken at the close of the trial.

I am in favor of reversing the judgment of the Supreme Court [which was in favor of plaintiff], and ordering a new trial.¹

Judgment reversed and new trial ordered.

ASHLEY v. CITY OF PORT HURON. 151

1877. 35 Michigan, 296.²

COOLEY, C. J. The action in this case was instituted to recover damages for an injury caused to the house of the plaintiff by the cutting of a sewer under the direction of the city authorities, and under city legislation, the validity of which is not disputed. The necessary result of cutting the sewer, the plaintiff claims, was, to collect and throw large quantities of water upon his premises which otherwise would not have flowed upon them; and it is for an injury thereby caused that he sues. The evidence offered on the part of the plaintiff tended to establish the case he declared upon, but the court instructed the jury that though they should find the facts to be as the plaintiff claimed, they must still return a verdict for the defendant. The ground of this decision, as we understand it, was, that the city, in ordering the construction of the sewer and in constructing it, was acting in the exercise of its legislative and discretionary authority, and was consequently exempt from any liability to persons who might happen to be injured. That is the ground that is assumed by counsel for the city in this court, and it is supposed to be the ground on which the case was decided in the court below.

In *Pontiac v. Carter*, 32 Mich., 164, the question of the liability of a municipal corporation for an injury resulting from an exercise of its legislative powers was considered, and it was denied that any liability could arise so long as the corporation confined itself within the limits of its jurisdiction. That was a case of an incidental injury to property caused by the grading of a street. The plaintiff's premises were in no way invaded, but they were rendered less valuable by the grading, and there was this peculiar hardship in the case, that the injury was mainly or wholly owing to the fact that the plaintiff's dwelling had been erected

¹ See *Chicago v. Seben*, 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245; *Bowden v. Kansas City*, 69 Kan. 587, 77 Pac. 578, 105 Am. St. Rep. 187; *Hart v. Millville*, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. N. S. 952.

² Citations of counsel omitted. — Ed.

begin with?

with reference to a grade previously established and now changed. In the subsequent case of *City of Detroit v. Beckman*, 84 Mich., 125, the same doctrine was reaffirmed. That was a case of injury by being overturned in a street in consequence of what was claimed to be an insufficient covering of a sewer at a point where two streets crossed each other. It was counted upon as a case of negligence, but the negligence consisted only in this, that the city had failed to provide for covering the sewer at the crossing of a street for such a width as a proper regard for the safety of people passing along the street would require. If this case is found to be within the principle of the cases referred to, the ruling below must be sustained, and that, we think, is the only question we have occasion to discuss.

The cases that bear upon the precise point now involved are numerous.

In *Rochester White Lead Co. v. Rochester*, 3 N. Y., 463, the city was made to respond in damages for flooding private premises with waters gathered in a sewer. This case is commented on in *Mills v. Brooklyn*, 32 N. Y., 489, and distinguished from one in which the injury complained of arose from the insufficiency of a sewer which was constructed in accordance with the plan determined upon. Obviously the complaint in that case was of the legislation itself, and of incidental injuries which it did not sufficiently provide against. The like injuries might result from a failure to construct any sewer whatever; but clearly no action could be sustained for a mere neglect to exercise a discretionary authority. — Compare *Smith v. Mayor, etc.*, 6 N. Y. Sup. Ct. (T. & C.), 685; 4 Hun, 637; *Nims v. Mayor, etc.*, 59 N. Y., 500. Cases of flooding lands by neglect to keep sewers in repair, of which *Barton v. Syracuse*, 37 Barb., 292, and 36 N. Y., 54, is an instance, are passed by, inasmuch as it is not disputed by counsel for the defendant in this case that for negligent injuries of that description the corporation would be responsible. Those cases are supposed by counsel to be distinguished from the one before us in this: that here the neglect complained of was only of a failure to exercise a legislative function, and thereby provide the means for carrying off the water which the sewer threw upon the plaintiff's premises. The distinction is, that the obligation to establish and open sewers is a legislative duty, while the obligation to keep them in repair is ministerial. But it is not strictly the failure to construct sewers to carry off the water that is complained of in this case; it is of the positive act of casting water upon the plaintiff's premises by the sewer already constructed.

[After citing cases where an action like the present was sustained.]

It is very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by

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a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort: but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other. — *Pumpelly v. Green Bay Co.*, 13 Wall., 166; *Armond v. Green Bay, etc., Co.*, 31 Wis., 316; *Eaton v. B. C. & M. R. R. Co.*, 51 N. H., 504.

A like excess of jurisdiction appears when in the exercise of its powers a municipal corporation creates a nuisance to the injury of an individual. The doctrine of liability in such cases is familiar and was acted upon in *Pennoyer v. Saginaw*, 8 Mich., 534.

Judgment reversed. New trial ordered.¹

NEVINS v. CITY OF PEORIA.

1866. 41 Illinois, 502, pp. 508, 509, 511, 512, 515.

LAWRENCE, J. .c. . The city is the owner of the streets, and the legislature has given it power to grade them. But it has no more power over them than a private individual has over his own land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without being responsible itself. Neither State nor municipal government can take private property for public use without due compensation, and this benign provision of our Constitution is to be applied by the courts whenever the property of the citizen is invaded, and without reference to the degree. We can solve more easily and safely questions of this character if we take pains to free our minds from the false notion that a municipality has some indefinable element of sovereign power

¹ See *Bates v. Westborough*, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156; *King v. Granger*, 21 R. I. 98, 41 Atl. 1012, 79 A. S. R. 779; *Platt v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691; *Uppington v. New York*, 165 N. Y. 228.

which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person.

It is said that the city must grade streets and direct the flow of waters as best as it can for the interests of the public. Undoubtedly, but if the public interest requires that the lot of an individual shall be rendered unfit for occupancy, either wholly or in part, in this process of grading or drainage, why should not the public pay for it to the extent to which it deprives the owner of its legitimate use? Why does not the constitutional provision apply as well to secure the payment for property partially taken for the use or convenience of a street, as when wholly taken and converted into a street? Surely the question of the degree to which the property is taken can make no difference in the application of the principle. To the extent to which the owner is deprived of its legitimate use and as its value is impaired, to that extent he should be paid.

There is much conflict of authority upon this question, and those courts which have taken a view different from our own, rest their conclusions in part upon the doctrine of public necessity, and the importance of preserving unimpaired, for purposes of public improvement, the efficiency of municipal corporations. In our opinion, the theory that private rights are ever to be sacrificed to public convenience or necessity, without full compensation, is fraught with danger, and should find no lodgment in American jurisprudence. To prevent this was the object of some of the most important of our constitutional guaranties. The property of the majority who control the government is in no peril; it is that of a feeble minority which is in danger, and whenever that is sought to be taken in a time of peace, under pretense of public necessity or convenience, the owner must find protection in the courts, or our institutions have failed of their great purpose—the complete security of private rights. It is undoubtedly important, as urged in the argument, that our cities should improve rapidly, and be able to carry onward large systems of drainage and grading, but, in the attainment of these ends, they cannot be permitted to sacrifice the property of the humblest citizen without compensation. Neither is it true that the rule we lay down will interfere with the growth of cities, as the expense of grading is not very largely increased by the construction of proper gutters and culverts for the flow of water.

Thus the cases divide themselves into two classes, one, and the larger class, holding that a city is only held to reasonable care and skill in grading its streets, and that if these are used, it can shield itself under its corporate powers from liability to individuals, the other holding that a city in the management of corporate property must be held to the same responsibilities that attach to individuals for injury to the property of others. We cannot doubt that the latter is the sounder rule. We are unable to see why the property of an individual should

nuisance

be sacrificed for the public convenience without compensation. We do not think it sufficient to call it *damnum absque injuria*. We know our Constitution was designed to prevent these wrongs. We are of opinion, that, for injuries done to the property of the appellant in the case before us, by turning a stream of mud and water upon his premises, or by creating in the immediate neighborhood of his dwelling an offensive and unwholesome pond, if the jury find these things to have been done, the city of Peoria must respond in damages.

KEASY v. CITY OF LOUISVILLE.

153

1836. 4 Dana (Kentucky), 154.

FROM the Circuit Court for Jefferson County.

Nicholas, for plaintiff.

Guthrie, for defendant.

ROBERTSON, C. J. Daniel Keasy, owning a lot on Jefferson street, in Louisville, on which he had erected a small wooden house, since that street had been graded and paved, under the charter of incorporation of 1828 — sued the city, in an action on the case, for elevating the grade about three feet above the level of his lot, after he had thus improved it, correspondently with the first grade, in consequence of which he had, as he avers, to fill up his lot and reconstruct his house, and had been, in other respects, subjected to inconvenience and damage.

The facts, as alleged, having been proved on the trial, on the general issue, the court instructed the jury that, if they should believe, "from all the evidence, that the Mayor and councilmen of the city of Louisville had the street filled or raised for the purpose of carrying off the water in that part of the city, and the injury complained of arose from filling or raising, they ought to find for the defendant."

J for >

Verdict and judgment were accordingly rendered in bar of the action. And it is that judgment which the plaintiff in error now seeks to reverse.

The constitutional power to incorporate the citizens of Louisville into a *municipal* body politic, possessing, as every artificial as well as natural being ought to possess, a self-will and the faculty of acting, of regulating its own affairs, and of governing its constituent members, as far as may be consistent with its charter, the federal and state constitutions and the general laws of the Commonwealth, and as may be proper for effectuating the legitimate ends of its creation, has been conceded by the plaintiff in error, in the fact of suing the corporation, and has, also, been necessarily presupposed by the Circuit Judge, in giving his hypothetical instruction to find for the *City* as defendant. And, not doubting either the power of incorporating the city, or the incidental

corporate right, either inherent, or derived from legislative authorization, to grade and pave the streets of the city, we are, also, of the opinion, that the corporation had authority to regrade and pave Jefferson street, or any other street, whenever the municipality might have deemed such an improvement useful to the local public.

The power of the Commonwealth over the streets, as well as over the local police, having been, not *alienated*, but delegated, or rather *deferred*, to the city itself, it was not material to the legal authority of the order for changing the grade of Jefferson street, that such a change was, in fact, necessary for draining water or for any other purpose. The city decided that it was proper — and personal inconvenience or private judgment, however repugnant to the policy of re-grading, could not have affected the legal validity of the order.

But the public right to regulate the common highways of the city, is, of course, not arbitrary and unlimited : far from it. Private *rights* must be regarded. The public, like a common person, must so use its own as not to *injure* another's property. It cannot take private property for public use, without paying a just equivalent ; nor can it disturb any personal *right* of enjoyment. But, without touching the plaintiff's lot, or in any way encroaching upon it, or interfering with any *prescriptive right, to light, or to private way*, the city had as clear and perfect authority to raise its street higher, or sink it lower, than the level of his lot, as he would undoubtedly have had to elevate or sink his ground, without touching or otherwise injuring or interfering with the public street.

On the trial of the case, there was no evidence tending, in any degree, to show, that the plaintiff's lot had been intruded on or touched ; or that the elevation in the grade of the street caused water to run or remain upon it, or rendered it less salubrious, or divested him of any *vested right*, or *unjustly* obstructed the enjoyment of any such right ; and mere *inconvenience*, to which, in his opinion or in fact, a public improvement in his city may have subjected him, is not sufficient *per se* to entitle him to damages. Every citizen takes and holds private property in land subject to the paramount public rights, and to the contingency of adventitious enhancement or diminution in value, resulting from the exercise of the public power for the common good, in any manner which shall not deprive him of *property*, nor disturb him in the lawful use of any thing which should, of right, be *his*. A citizen cannot be compelled to pay for private advantage arising from the location of a public way ; nor, — unless his property be taken or, in some way, *encroached on*, so as to divest him of some exclusive individual right, — can he be entitled to damages for incidental *disadvantage*. If the city possess power to shut up Jefferson street, and should exercise it, the *reclusion* would subject the plaintiff, and others also, to much more inconvenience and actual loss than any which could have been occasioned by the elevation of the grade : but, — the power conceded, — a legal right to damages for the total obliteration of the street could not be maintained. It would have been *damnum absque injuria* — loss, not

injury — *inconvenience*, not *wrong* — to which every citizen must submit, and to something like which every citizen does submit, for the public good.

As to the legality or propriety of some of the modes of making public improvements in the city of Louisville, this Court has no right to give any opinion in this case. The means employed for effecting an allowable end may be inappropriate, or even unauthorized, but the end itself — when accomplished — is not therefore the less unexceptionable. Jefferson street has been re-graded — by what instrumentality is not here material; the end was lawful; the city had a right to effect it in some mode; and having done so, without injury to any of the plaintiff's private rights, (as we are bound to presume from this record,) he has no legal title to demand any damages for an accidental consequence, arising from the rightful exercise of a public power, without any tortious, or negligent, or unjust act or omission.

We have not said, nor can we say, that a citizen may not be entitled to damages for a deprivation of the use of his property by a public way which may not take, or even touch, any of his land. But the case in which such a right to damages might be recognised, must be an extreme and peculiar one. And this is not such an one, but is an ordinary case occurring, in a greater or less degree, frequently — almost constantly; and the public could not well bear the heavy and vexatious burden of such demands as would forever arise from such cases, were they admitted to be cases of private injury, for which an action could be maintained. Nor could individual citizens be justly subjected to the *reciprocal* claims of the public against *them*, for the like inconvenience arising from their *lawful use* and enjoyment of nothing but their own private property. And hence, as a general rule, the law gives no damages to either party, when there has been no trespass, nor any nuisance which might have been avoided without a surrender of a just and necessary right.

If, as we have supposed and decided, the city had authority to change the first grade, there could have been no implied agreement, when that was fixed, that it would never be changed, any more than such an agreement, between the United States and the owners of land on the Cumberland Road, never to change the location or grade of that national way, could be deemed as having been implied.

Wherefore, it seems to us, that the plaintiff altogether failed to prove any fact from which the jury would have had a right to infer, that he had a legal right to damages. And therefore, it is our opinion that, however unnecessary or inappropriate the hypothetical assumptions of the Court may be deemed to have been, the instruction was not erroneous to the plaintiff's prejudice — and the judgment consequently must remain unreversed.¹

¹ The absence of municipal liability at common law, in cases like *Keasy v. Louisville*, has been affirmed by the courts in most of the states. (For the exceptional decisions

WALDRON v. CITY OF HAVERHILL. 154

1887. 143 *Massachusetts*, 582.

TORT, for injuries occasioned to the plaintiff's real estate by reason of the operation of a stone-crusher on land of the defendant, between August 1 and October 21, 1884.

At the trial in the Superior Court, before *Mason, J.*, it was admitted that the plaintiff, during the time alleged in his declaration, was in the occupation and possession of the premises described therein; and that, during said time, a stone-crusher, engine, and boiler, all of which were the property of the defendant, were operated under the direction of one Mansur, who was the superintendent of streets of the defendant city, for the purpose of crushing rocks and stones for the city, used, when so crushed, in keeping the public streets in the city in suitable order and condition for travel. The stone-crusher was situated on land of the city formerly used as a gravel pit for supplying materials to be used in repairing said streets and highways, and was, during the time alleged in the declaration, used exclusively in the preparation of materials to be used in keeping said streets and highways in repair. Said land was a short distance from the plaintiff's premises, and, by the operation of the stone-crusher, stone dust arose and was deposited on the plaintiff's premises, which were thereby damaged to the amount of \$50. The men who operated the stone-crusher under the direction of Mansur were paid therefor by the defendant.

Taylors?

It also appeared in evidence, that the plaintiff occupied his said premises before the stone-crusher was placed upon the defendant's land; that the ownership, use, and operation of the stone-crusher, engine, and boiler, and the ownership and occupation of said land of the defendant, were reasonably necessary for the keeping of said highways in reasonable order and repair for travel; but that it would have been practicable, by the erection of a board fence, to have prevented said damage to the plaintiff's premises by said dust. It

contra in Ohio, see *McCombs v. Akron Council*, 15 Ohio, 474; s. c. 18 Ohio, 229; *Crawford v. Village of Delaware*, 7 Ohio State, 459; and other cases reviewed in *Lewis on Eminent Domain*, s. 98.) 2 Dillon, *Mun. Corp.*, 4th ed., s. 990. Statutes, however, have been enacted in some states giving compensation for damages to abutting property by change of grade. These statutes and the decisions thereunder are reviewed in *Lewis on Eminent Domain*, ss. 207-218; and late decisions are collected in 6 *Lewis, Am. R. R. & Corp. Reports*, p. 257, note. Some modern constitutions provide that compensation shall be made, not only for property taken for public use, but also for property damaged or injured. Under such provisions it has been held that the abutting owner may recover for damage to his property by a change in the grade of the street. See 2 *Lewis, Am. R. R. & Corp. Rep.* p. 435, note; 6 *Ibid.*, p. 257, note; and compare 2 Dillon, *Mun. Corp.*, 4th ed., ss. 995 a, 995 b, and 995 c. — Ed.

further appeared that the mayor of the city, who was chairman of the committee on public streets, on two occasions during the time alleged, was on the defendant's land.

The material provisions of the city charter and ordinances, which were introduced in evidence, appear in the opinion.

The judge ruled, as matter of law, that the plaintiff was not entitled to recover; and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

B. B. Jones, for the plaintiff.

J. J. Winn, for the defendant.

C. ALLEN, J. If a city or town, instead of leaving the duty of keeping the highways in repair to be performed by the officers, and in the methods provided by the general laws, assumes to perform it by means of agents whom it may direct and control, it may be held responsible for the acts of those agents. The chief grounds of a town's exemption from responsibility for the acts of surveyors of highways, as stated in *Walcott v. Swampscott*, 1 Allen, 101, and in later cases, are, that their powers and duties are prescribed and regulated by statute, and that, in the performance of these duties, they are independent of the town, and cannot be directed, or controlled, or removed from office by the town, and are not amenable to it for the manner in which they discharge the trust reposed in them by law; nor can the town exercise any right of selecting the servants or agents by whom surveyors shall perform their work. These reasons are not applicable to a case where a town performs the work by means of agents of its own. *Hawks v. Charlemont*, 107 Mass. 414. *Deane v. Randolph*, 182 Mass. 475. *Sullivan v. Holyoke*, 185 Mass. 278. *Tindley v. Salem*, 137 Mass. 171.

The present case falls within the latter class. By the city charter, the administration of all the fiscal, prudential, and municipal affairs of the city of Haverhill is vested in the city council. By the city ordinances, a superintendent of highways, removable at the pleasure of the city council, is to be chosen. He is to act under the direction of the committee on streets, ways, and sewers, which is a committee of the city council. Special provisions show more in detail his subordination to the city council, and to its committee. The work which caused the injury to the plaintiff's property was done on land of the city, which land for a period of nearly three months was used exclusively for the preparation of materials for repairing the streets and highways of the city. There is nothing to show that this use of the city's land was unauthorized. The contrary is to be assumed. Upon all the facts stated, the work in question appears to have been done by agents of the city, for whose acts and neglects in the performance thereof the city is responsible.

The case of *Barney v. Lowell*, 98 Mass. 570, was distinguished, on grounds equally applicable here, in *Hawks v. Charlemont*, *ubi supra*, by Chief Justice Chapman, who took part in the decision of both cases.

Exceptions sustained.

MILES v. CITY OF WORCESTER. 155

1891. 154 Mass. 511.¹

TORT for damages occasioned by an encroachment upon the plaintiff's land of a wall erected between the same and an adjoining lot belonging to the defendant city.

There was evidence that about the year 1871, the city built a wall on the south side of its high school lot between it and the plaintiff's lot, which were then at the same grade, upon a line mutually agreed upon, and proceeded to fill up its land to a level as high as the top of the wall, or even higher; that the wall since it was built had been pressed out of position by reason of the weight of the filling behind it, or by the action of surface water or frost, so that for nearly or quite a foot at the bottom it had bulged out and come upon the plaintiff's land; and that this bulging out of the wall had increased within six years before the date of the writ, and had gradually affected the plaintiff's estate.

The judge instructed the jury, in substance, that if the plaintiff by reason of the encroachment of the wall had been kept out of possession and occupation of a part of his land, and if within six years before the date of the writ the city had allowed or suffered the wall to be pushed and crowded upon the plaintiff's land, creating a nuisance thereto, causing him special and peculiar damage, then there was a liability in an action of tort as for a nuisance, no other objection existing to a recovery.

Verdict for plaintiff. Defendant excepted.

F. P. Goulding, for defendant.

W. S. B. Hopkins (F. B. Smith with him), for the plaintiff.

ALLEN, J. It is obvious that the defendant's wall, in its present position upon the plaintiff's land, must be deemed an actionable nuisance, unless the defendant can claim exemption from responsibility on some special ground. *Codman v. Evans*, 7 Allen, 431. *Nichols v. Boston*, 98 Mass. 39, 43. *Fay v. Prentice*, 1 C. B. 828. The defendant suggests that it is not liable, because the wall was built and maintained solely for the public use, and with the sole view to the general benefit and under the requirement of general laws; and that the case cannot be distinguished in principle from the line of cases beginning with *Hill v. Boston*, 122 Mass. 344, and ending with *Howard v. Worcester*, 153 Mass. 426. We are not aware, however, that it has ever been held that a private nuisance to property can be justified or excused on that ground. The verdict shows a continuous occupation of the plaintiff's land by the encroachment of the defendant's wall. The question of negligence in the building of the wall is not material.

¹ Statement abridged. — Ed.

The erection was completed, and was accepted by the defendant, and is now in the defendant's sole charge; and if it is a nuisance, the defendant is responsible. *Staple v. Spring*, 10 Mass. 72, 74. *Nichols v. Boston*, 98 Mass. 39. Such an occupation of the plaintiff's land cannot be excused for the reasons assigned. A city cannot enlarge its school grounds by taking in the land of an adjoining owner by means of a wall or fence. The public use and the general benefit will not justify such a nuisance to the property of another. If more land is needed, it must be taken in the regular way, and compensation paid, but if, by the action of the elements or otherwise, without the plaintiff's fault, the defendant's wall comes upon the plaintiff's land and continues there, it becomes a nuisance for which the defendant is responsible; and so are the authorities. *Gorham v. Gross*, 125 Mass. 232, 239. *Khron v. Brock*, 144 Mass. 516. *Eastman v. Meredith*, 86 N. H. 284, 296. *Hay v. Cohoes Co.* 2 Comst. 159. *Tremain v. Cohoes Co.* 2 Comst. 163. *Weet v. Brockport*, 16 N. Y. 161, 172, note. *St. Peter v. Denison*, 58 N. Y. 416, 421. *Mayor & City Council of Cumberland v. Willison*, 50 Md. 138. *Harper v. Milwaukee*, 30 Wis. 365. *Pumpelly v. Green Bay Co.* 13 Wall. 166, 181. *Dillon Mun. Corp.* § 985.

The case is distinguishable from *Middlesex Co. v. McCue*, 149 Mass. 103, where soil from the defendant's land upon a hillside was washed into the plaintiff's mill-pond by the rains, when the defendant had built no artificial structure, and had done nothing more than to cultivate his land in the ordinary way. *Exceptions overruled.*

WILSON v. MITCHELL. 156

1903. 17 S. D. 515.

CORSON, J.¹ The plaintiff brought this action to recover of the defendant the sum of \$694, the alleged value of the use and occupation of a certain city lot, with an artesian well thereon, belonging to the plaintiff, for a period of about seven years. A verdict was directed in favor of the defendant, and the plaintiff has appealed.

At the close of all the evidence the defendant moved the court to direct a verdict for the defendant upon the ground that the undisputed evidence showed that the city did not sink a well upon the lot in question, and did not ratify the act of the superintendent of the water-works in connecting the city mains with the well, and that there was no evidence in the case tending to prove that the city, at the time that it allowed the bill of the city plumber for connecting the city water-works with the well, knew that the well in question was upon the lot

¹ Arguments omitted. — En.

of the plaintiff, and not upon the city property. The motion was granted, and the motion for a new trial denied.

It appears from the evidence that in 1893 the plaintiff was the owner of the city lot, and artesian well thereon, and that in the latter part of that year the superintendent of the waterworks of said city caused a connection to be made between the city mains and the said artesian well without any contract between the city and the plaintiff, and without the plaintiff's consent. There was no evidence, however, tending to prove that the municipality had any knowledge or notice that the well belonging to the plaintiff had been connected with the city waterworks, other than the fact that the same had been connected by the city plumber by order of the superintendent of the waterworks, and the fact of the allowance by the city of the plumber's bill for doing the work and furnishing the material therefor; but it was not shown that either the superintendent of the waterworks, the city plumber or the city council knew that the well was upon plaintiff's property. The liability of the city is sought to be maintained upon the ground that the plaintiff's well was connected with the city waterworks under the direction of the superintendent of the same, and that the city used the water for the period above stated. It is also claimed by the appellant that the city is liable, the same as an individual, upon an implied contract, and, therefore, it being shown that the city has used the lot and well thereon during the time stated, the plaintiff is entitled to recover for the use and occupation of the same. It is undoubtedly true that under the modern decisions a municipal corporation may be liable upon an implied contract, if an express contract would be within the powers of the municipality, delegated to it, and the city has ratified the act of its officers; but the claim that the city ratified the act of the superintendent of the waterworks by allowing the plumber's bill for making the connection is not tenable. There is nothing in the bill itself indicating that the work was for connecting the waterworks with the well upon the plaintiff's lot. The item in the bill claimed to have constituted the ratification of the act of the superintendent of the waterworks reads as follows: "To 11 days work for city plumber in connecting new well with mains, \$44;" and for 37 days work assisting same, \$34. Only one of the members of the city council was called as a witness, and he testified that, as a member of the finance and waterworks committee, he approved the bill, but at the time he approved it he supposed the work was done upon a city lot. It is well settled that an act of an agent is not ratified unless the principal is fully advised of all the facts connected with the act it is claimed he ratifies. *Shull v. New Birdsall Co.*, 15 S. D. 8, 86 N. W. 654. It not being affirmatively shown that either the superintendent of the waterworks or any member of the city council had any knowledge that the city waterworks had been connected with the well belonging to the plaintiff, there was no ratification that can bind the city.

But there is a more satisfactory ground for denying the city's lia-

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bility. The municipality had no authority to connect its waterworks system with the well of the plaintiff without his consent, and the city officer, therefore, had no authority to invade plaintiff's property, and the city could not legally ratify the act of its agent in making such connection. As the city had no power to enter upon private property and appropriate the same to public use, except in the manner provided by law for condemnation of such property, the defendant did not have the power to enter upon the lot of the plaintiff and use the same for public purposes without his consent. The acts of the officers of a municipality cannot bind it unless they are acting within the scope of the powers expressly granted by its charter or necessarily incident thereto, or indispensable to the proper exercise of the powers granted. *Sioux Falls v. Kirby*, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621.

It is contended on the part of the defendant that it was competent for the plaintiff to waive the tort, and sue upon the implied contract for the use and occupation of the premises, and recover the value of such use and occupation. This right might be exercised in the case of an individual, but such a rule has no application to the case of a municipal corporation, as the powers of such corporation are limited, and it cannot exercise such as are not expressly granted, or necessarily incident to the power granted. In *Rowland v. City of Gallatin*, 75 Mo. 134, 42 Am. Rep. 395, the Supreme Court of Missouri, discussing a similar question, says: "Conceding the plaintiff's claim in this regard, and the finding of the court thereon to be correct, still there is no authority in the charter of the city of Gallatin or elsewhere for the officer of the city, in pursuance of an ordinance or otherwise, to enter upon private property, and remove earth or other material therefrom, or in any other manner interfere therewith, for the purpose of improving the streets of said city; and the city cannot, therefore, be held liable for the acts charged. *Thomson v. City of Boonville*, 61 Mo. 283; *Hunt v. Same*, 65 Mo. 620 [27 Am. Rep. 299]." In that case the premises of the plaintiff were entered upon by the street commissioner of the city under the verbal direction of the mayor. But as we have seen, the court held that the municipality was not liable. It is true that was an action of trespass, but undoubtedly the same rule would have been held had the plaintiff waived the tort and sued for the value of the material taken from the lot. The basis of the action would have been the trespass committed by the street commissioner. So, in the case at bar, the trespass of the superintendent of the waterworks in connecting the waterworks system with the well of the plaintiff is the basis of this action, for which trespass, as we have seen, the city would not be liable. Waiving the tort, therefore, by plaintiff, and seeking to recover upon an implied contract, does not change the rights of the parties. As bearing upon this question, see *Cavanagh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716; *Seele v. Deering*, 79 Me. 343, 10 Atl. 45, 1 Am. St. Rep. 314; *Smith v. City of Rochester*, 76 N. Y. 506; *Morrison v.*

It can't waive
the implied contract
for occupation.

City of Lawrence, 98 Mass. 219; *Rowland v. City of Gallatin*, 75 Mo. 184, 42 Am. Rep. 395.

We are clearly of the opinion, therefore, that the plaintiff, under the evidence in this case, was not entitled to recover, and that the court below rightly directed a verdict in favor of the defendant. The judgment of the circuit court and the order denying a new trial are affirmed.¹

SALT LAKE CITY v. HOLLISTER. 157

1886. 118 U. S. 256.²

APPEAL from the Supreme Court of the Territory of Utah.

Suit by the city, against the U. S. collector of internal revenue, to recover the sum of \$12,057.75 illegally exacted by him for a special tax upon spirits alleged to have been distilled by the city.

The answer of the defendant alleges that the tax was legally assessed, and avers that the plaintiff, during all the time for which said assessment was made, was actually engaged in distilling, producing, and dealing in, as distiller, said spirits so assessed, and said assessment of said gallon tax was made upon distilled spirits actually produced by the plaintiff, and upon which plaintiff had not paid the gallon tax required by law, said spirits not having been deposited in the bonded warehouse of the United States by the plaintiff, as required by law, but taken from said distillery by the plaintiff, after having been produced and distilled as aforesaid, and sold by said plaintiff, and the proceeds of said sale turned into the treasury of the plaintiff.

The answer also alleges that the plaintiff, from March 2, 1867, to Aug. 26, 1868, was distilling and producing spirits, and receiving and appropriating the benefit arising therefrom.

The answer further alleges that the plaintiff regularly reported and paid to the collector the gallon tax due upon a part of the spirits distilled by the plaintiff, but that the plaintiff neglected to report all of the spirits it actually distilled, and that the tax now in question was assessed upon the spirits distilled in excess of the amount reported by the plaintiff.

A demurrer to the answer was overruled, and, the plaintiff refusing to plead further, judgment was rendered for the defendant.

Franklin S. Richards, (*Benjamin Sheeks*, and *J. L. Rawlins*, with him), for plaintiff.

Solicitor General, for defendants.

¹ See *Cunningham v. Seattle*, 40 Wash. 59, 82 Pac. 143, 4 L. R. A. N. S. 629.

² Statement abridged. — ED.

MILLER, J. [After stating the case.] It will be perceived that this demurrer admitted that the plaintiff, The City of Salt Lake, had been for a period of about eighteen months engaged in the business of distilling and producing spirits and selling the same, and placing the proceeds of the sale in its treasury. That during this time the plaintiff made regular reports as to the quantity produced and paid the tax on the amounts so reported. But that while it thus operated said distillery, it failed and neglected to report all the spirits which it produced, and the tax assessed and collected, and which the present suit is brought to recover back, was for the spirits of which no report was made.

The Commissioner of Internal Revenue having assessed plaintiff for these distilled spirits and placed the assessment in the hands of defendant, he, as a means of collecting the tax, did threaten to seize and sell property of plaintiff, whereupon plaintiff paid the sum mentioned.

It would seem that this unqualified admission that the city was actually engaged in the business of distilling spirits liable to taxation, and replenishing her treasury with the profits arising from the operation, ought to be a justification of the officer who collected the tax due for the spirits so distilled. And this argument is all the stronger, since the city acknowledged its liability as a distiller by paying voluntarily the tax due on the larger part of the spirits produced.

But while the city does not deny the *actual* fact of distillation, and of fraudulent returns by it, it denies the whole affair by argument. It says, that, though it is very true the city did distil spirits, did sell them, and did receive the money into its treasury, it cannot be held liable for this because it had no legal power to do so. Its want of corporate authority to engage in distilling is to be received as conclusive evidence that it did not do so, while by the pleading it is admitted that it did. Because there was no statute which authorized it as a city of Utah to distil spirits, it could engage in this profitable business to any extent, without paying the taxes which the laws of the United States require of every one else who did the same thing.

If the Territory of Utah had added to its other corporate powers that of making and selling distilled spirits, then the city would be liable to the tax, but, because it had no such power by law, it could do it without any liability for the tax to the United States or to any one else.

It would be a fine thing, if this argument is good, for all distillers to organize into milling corporations to make flour, and proceed to the more profitable business of distilling spirits, which would be unauthorized by their charters or articles of incorporation; for they would thus escape taxation and ruin all competitors.

It is said that the acts done are not the acts of the city, but of its officers or agents who undertook to do them in its name. This would be a pleasant farce to be enacted by irresponsible parties, who give no bond, who have no property to respond to civil or criminal suits, who

make no profit out of it, while the city grows rich in the performance. It is to be taken as a fair inference on this demurrer that all that the city might have done was done in establishing this business. The officers who, it is said, did this thing, must be supposed to have been properly appointed or elected. Resolutions or ordinances of the governing body of the city directing the establishment of the distillery and furnishing money to buy the plant, must be supposed to have been passed in the usual mode. Everything must have been done under the same rules and by the same men as if it were a hospital or a town hall. If the demurrer had not admitted this, it could no doubt have been proved on an issue denying it.

But the argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all. A railroad company authorized to acquire a right of way by such exercise of the right of eminent domain as the law prescribes, which undertakes to and does seize upon and invade, by its officers and servants, the land of a citizen, makes no compensation, and takes no steps for the appropriation of it, is a naked trespasser, and can be made responsible for the tort. It had no authority to take the man's land or to invade his premises. But if the governing board had directed the act, the corporation could be sued for the tort, in an action of ejectment, or in trespass, or on an implied assumpsit for the value of the land. A plea of *ultra vires*, in this case, would be no defence.

The truth is, that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi-criminal, the corporation may be held to a pecuniary responsibility for them to the party injured.

This doctrine was announced by this court nearly thirty years ago in a carefully prepared opinion by Mr. Justice Campbell in the case of *Philadelphia, Wilmington and Baltimore Railroad Co. v. Quigley*, 21 How. 202.

[The learned Judge then stated the last mentioned case; and also referred to *Reed v. Home Savings Bank*, 130 Mass. 443, 445, and *Copley v. Grover and Baker Sewing Machine Co.*, 2 Woods, 494, in which the defendant corporations were held liable to actions for malicious prosecution.]

It is said that Salt Lake City, being a municipal corporation, is not liable for tortious actions of its officers.

While it may be true that the rule we have been discussing may require a more careful scrutiny in its application to this class of corporations than to corporations for pecuniary profit, we do not agree that

they are wholly exempt from liability for wrongful acts done, with all the evidences of their being acts of the corporation, to the injury of others, or in evasion of legal obligations to the State or the public. A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the Government on such business or transaction by whomsoever conducted. See *McCready v. Guardians of the Poor of Philadelphia*, 9 S. & R. 94.

It remains to be observed, that the question of the liability of corporations on *contracts* which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practised on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong — cases where corporations have been sued on contracts which they have successfully resisted because they were *ultra vires*.

But, even in this class of cases, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use. *Thomas v. Railroad Co.*, 101 U. S. 71; *Louisiana v. Wood*, 102 U. S. 294; *Chapman v. Douglass County*, 107 U. S. 348, 355.

The judgment of the Supreme Court of Utah Territory is

Affirmed.

CITY OF HENDERSON v. CLAYTON. 158

1900. 57 S. W. 1.

Hobson, J.¹ Appellee filed suit to recover damages for the location of its pest house within one mile of the corporate limits of the city of Henderson, by reason of which she and her family took the smallpox. She sought to recover against the city and the municipal officers jointly. This is the second appeal of the case. The opinion on the former appeal will be found in *Clayton v. City of Henderson*, 44 S. W. 667. On that appeal it was held that she could not sue the city and its officers jointly, and on return of the case she elected to prosecute

¹ Part of the opinion only is given. — Ed.

the action against the city alone. After this a trial was had, resulting in a verdict and judgment against the city for \$2,775. From this judgment the city prosecutes the appeal now before us. Section 3909, Ky. St., is as follows: "It shall not be lawful to locate or maintain any pest house or other place intended for the treatment of eruptive diseases, or diseases which are contagious or infectious, within the corporate limits of any incorporated city or town, or within a distance of one mile of the boundary line thereof. Any officer of any city or town, or other person, who shall violate the provisions of this act, or in any wise aid or abet therein, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction, shall be fined not less than five hundred dollars nor more than one thousand dollars, and be liable in damages to any person injured thereby, and if willfully done, such person or his heirs or representatives may recover punitive damages." As the city was authorized by law to establish and maintain a pest house, the acts of its officers in establishing and maintaining the pest house in question were its acts, and it is responsible to the party aggrieved, as well as its agent through whose instrumentality it acted. This was expressly determined on the former appeal.

Stat.

Agency o.k.

It will be observed that, while the statute imposes a duty upon the city, it provides a remedy by action only against the city officers in behalf of the person injured. While this court on the former appeal said that a common-law cause of action was stated against the city, it was not meant that the petition stated only a common-law cause of action independent of the statute. We think the averments sufficient to constitute a cause of action independent of the statute, and also a cause of action, which, according to the common law, arises from the violation of a statute enacted for the protection of the citizen. From time immemorial, where a statutory duty for the protection of individuals had been violated, an action at common law might be maintained. The common-law rule referred to is thus stated in Com. Dig. tit. "Action upon Statutes": "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." Another common-law authority thus states the rule: "Whenever an act of parliament doth prohibit anything, the party grieved shall have an action, and the offender shall be punished at the king's suit. It is written in the hornbook of the law that the public and a party particularly aggrieved may each have a distinct but concurrent remedy for an act which happens to be both a public and a private wrong." End. Interp. St. § 463. The same common-law rule is laid down in Bish. Noncont. Law, § 133, and in Cooley, Torts, p. 658. It is also recognized in section 466, Ky. St.: "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such vio-

? nuisance?

lation be thereby imposed." While the statute involved here imposes on the municipal officers a criminal responsibility, and also makes them liable civilly to the party aggrieved for the injury or for punitive damages, if it is willfully done, it is silent as to a remedy against the municipality, and, nothing being provided as to the remedy against it for its doing what the statute makes unlawful, the common-law rule applies; for the wrong is the act of the city whose orders the municipal officers execute, and as the remedy against the officers might in many cases, from insolvency and the like, be wholly inadequate, this provision of the statute, nothing to the contrary appearing, must be regarded as merely cumulative. The city of Henderson was therefore liable to appellee for such damages as she sustained by reason of the city's violation of section 3909, Ky. St., above quoted, although that statute did not in terms impose this liability on it, and the court below properly so instructed the jury.

Judgment affirmed.

THOMPSON NAVIGATION CO. v. CITY OF CHICAGO. 157

1897, 79 Fed. 984.

GROSSCUP, J. This is a libel *in personam* against the city of Chicago, growing out of a collision between the fire tug Yo Semite, owned by that city, and the propeller City of Berlin, owned by the libellant. The collision occurred in the Chicago river, near the point where it branches into its south and north forks. At the time of the collision, the City of Berlin was lying in winter quarters. The circumstances of the collision were such that had the tug been owned by private owners, and engaged in a private enterprise, there could be no doubt of her liability for the injury done. In saying this, I keep fully in view the fact that fire tugs are expected by the nature of their duties to make haste. The haste in this case was blind and thoughtless, resulting in a delay to the tug, as well as injury to the City of Berlin. Indeed, counsel for the city do not seriously contest the fact of negligence. But the fire tug was at the time of the collision owned by the city of Chicago, and actually engaged in one of the public duties that Chicago, as a part of the government, undertakes. Do these facts, or either of them, exempt her, or the city, responding in her behalf, from what would otherwise be her clear liability?

At common law, one injured either in his property or person looks for compensation to the person or persons causing the injury, or to the master or principals of such persons, where the injury was done within the scope of their agency or service. In admiralty the rule is this: The vessel committing the unlawful injury is considered the offender,

and the owner is mulcted to the extent of his interest in the vessel; not because he stands in the relation of principal or master to the crew, but alone because of the fact of ownership. Thus, under laws preventive of piracy or smuggling, the vessel may be seized, condemned, and sold, notwithstanding the crew committing the unlawful acts were engaged by the owner for a lawful enterprise only, and were, in the commission of the unlawful acts, wholly outside the scope of their engagement. *U. S. v. The Malek Adhel*, 2 How. 210. Commenting upon this apparent anomaly of maritime jurisprudence, and showing that the doctrines advanced in the case then under consideration were not different from those prevailing generally in maritime law, Mr. Justice Story, at page 234, speaks as follows: "The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

It is thus apparent that the liability of the owner, to the extent of his vessel, for injuries caused in a collision by negligence or misconduct, is not dependent upon the relation of master and servant, or principal and agent, existing between him and the crew manning the vessel, but rests solely upon the fact of ownership. The ship, which, in contemplation of maritime law, is not the hulk and machinery only, but includes the crew as well, is, as such, the offender, and the ensuing losses reach the owner simply because of his relationship to the offender. In Rome, it is said that, when the owner of slaves was assassinated, every slave belonging to him, however otherwise innocent, was put to death. The penalty came not as the result of participation, but as the result of relationship. The maritime law, for justifiable public purposes, inverts this mandate, putting every owner, by virtue of such relation, to the duty of compensation for losses inflicted by his ship property, to the extent, at least, of the value of such property. Nor is this liability of the owner indirect alone, for the admiralty rules of the supreme court provide (Rule 15) "that, in all suits for damage by collision, the libellant may proceed against either the ship and master, or against the owner alone *in personam*." The method of procedure chosen does not change the substantive right or liability. In either case the ship is the offender. If the procedure be against the ship alone, resulting in seizure and sale, the owner is only indirectly reached; but, if it be against the owner *in personam*, the remedy against him is direct. The substantive right is compensation for the injury, and can be either by way of the ship or from the owner directly.

A firm grasp of this principle of maritime law clears this case of its difficulties. At common law the city is not liable for the negligent acts of its fire department, for the reason that the members of the fire department are not the servants of the city in its corporate capacity. The negligence of the firemen, therefore, is not attributable to the city. But in the case under consideration the injury done by the vessel, including its crew, to the libellant, is chargeable to the owner, by virtue of the mere fact of ownership, and can be collected, directly, by seizure of the vessel, or, indirectly, by a suit *in personam*. In either case the liability rests, not in the relation of principal and agent, or master and servant, but in the bare fact of ownership.

But, though such liability exists, reasons of public policy may, in some cases, exempt the owner from suit. The government, as sovereign, for instance, declines to be made compulsorily amenable to the courts upon even its just obligations. This exemption, however, is founded entirely in public policy (*The Siren*, 7 Wall. 152), and ought not to be extended to cases where such considerations do not intervene. In England, I think, they do better. In claims arising against public vessels, the apparently conflicting right of the sovereign to exemption from suit, and her duty to respond to just claims, are both maintained by a procedure, effective, though somewhat fictitious. A petition of right is addressed by the aggrieved person to the lords in admiralty, representing the crown, who, in turn, direct their proctor to appear and answer a suit to be commenced in the admiralty court. This is equivalent to a waiver by the crown of its privilege as a sovereign, and to a consent that the rights of the parties be tried and determined in the suit as between subject and subject. There appears, however, to be no way of making the government of the United States, or of a state, parties to such a proceeding, because no procedure has been invented here whereby the right of immunity from suit is waived. But the city of Chicago is, by law, amenable to suit and judgment upon all just claims that may be brought against it. The doctrine of public policy, therefore, under which this exemption is accorded to sovereigns, stops short of city government. The law by making such cities suable abolishes the doctrine in what might otherwise be its application to city governments. The legislative will has, in effect, decreed that there is no public policy excepting cities from suit. The city is suable, and may be decreed to pay as a private owner where a case is proved. This clearly differentiates this case from *The Siren*, *supra*.

One other consideration alone remains: I have held, on the strength of *The Fidelity*, 16 Blatchf. 569, decided by Chief Justice Waite on the circuit, that an action *in rem* cannot lie against this fire boat. Will that prevent a decree *in personam* against its owner? The difference between mere procedure and substantive right must be steadily borne in mind. The latter alone determines the right of some judgment or redress. The former only fixes the method of

reaching it. A seizure of the vessel is only a species of execution in advance of judgment. It is usually permissible in admiralty, because, under ordinary circumstances, most effective and equitable. But public policy prevents its application to such instrumentalities of emergency as a fire tug. A city cannot be left to burn while a contest over a few dollars of damage is going on. The law, therefore, out of considerations of public policy, forbids such seizure, or any process that would disarm the city, even temporarily, of its equipment to put down fires or like dangers. But exemption of the owner of the boat from one of the ordinary processes of the court is not, either in logic or law, a grant of immunity against liability, through some other procedure, not subject to such objections. The consideration of public policy extends only to the mischief to be averted. To give it a wider application would make it an instrument of injustice. An apt illustration of this limitation on procedure only is seen in the law which exempts cities, in the common-law court, from seizure of their property upon execution. But it has never been urged that, because of that, they were not suable at all, or that judgments entered against them were in no way enforceable.

My conclusion is that the city of Chicago, as owner, at the time of the collision, of the fire boat, is responsible to the libellant in an action *in personam* to the extent of the value of such fire boat for the injuries caused. I recognize that in this conclusion I depart from the case of *The Fidelity*, *supra*, but believe myself to be in consonance with the doctrine laid down in *The Siren*, *supra*, and *The Malek Adhel*, *supra*.

Decree accordingly.

b. NEGLIGENCE IN EXECUTING GOVERNMENTAL FUNCTIONS.

LEVY v. MAYOR &c. OF NEW YORK.

1848. 1 Sandford, New York Superior Court, 465.²

THE city of New York, having the requisite power, enacted an ordinance prohibiting swine from running at large in the streets, with a penalty and also a provision for impounding the animals. The city neglected to enforce the ordinance. A swine, suffered to roam at large in the street, attacked the plaintiff's son, aged 8. The boy was mortally injured, dying the next day. The father brought an action on the case against the city, to recover damages for the loss of his son's services and for the expenses of burial. The declaration alleged, in substance, the foregoing facts. The defendants demurred.

¹ See *Workman v. New York*, 180 U. S. 552.

² Statement abridged.—Ed.

10 Cases

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Willis Hall, for defendants.

T. Warner, for plaintiff.

SANDFORD, J. The plaintiff's counsel well observed, that there was no precedent for such an action as this; and we are compelled to add, that there is no principle upon which it can be sustained.

The corporation is undoubtedly vested with certain legislative powers, among which is the authority to restrain swine from running at large in the streets; and they have exercised it by enacting an ordinance to that effect. The idea, that because they may prohibit a nuisance, that therefore they must not only pass a prohibitory law, but must also enforce it, at the hazard of being subjected to all damages which may ensue from such nuisance, is certainly novel. The corporation of the city, in this respect, stands upon the same footing within its own jurisdiction, as the state government does in respect of the state at large.

It is the duty of the government to protect and preserve the rights of the citizens of the state, both in person and property, and it should provide and enforce wholesome laws for that object. But injuries to both person and property will occur, which no legislation can prevent, and which no system of laws can adequately redress. The government does not guaranty its citizens against all the casualties incident to humanity or to civil society; and we believe it has never been called upon to make good, by way of damages, its inability to protect against such misfortunes.

There would be no end to the claims against this city and state, if such an action as this is well founded. If a man were to be run over, and his leg broken by an omnibus racing in the street, he would forthwith sue the city for damages, because the corporate authorities neglected to enforce their ordinance against racing and furious driving in the public streets. So, if some miscreant, by placing a stick of timber on a railroad track, should cause the destruction of a passenger train, with great loss of life and limb; the legislature would be petitioned by the injured survivors, and the relatives of the deceased, for the damages thereby occasioned, on the ground, that the public servants should have enforced the statute enacted against such offences.

There are innumerable illustrations of the application of the principle. It suffices to say, that no government, whether national, state or municipal, ever assumed, or was subjected to a general liability of this description.

There is no analogy between a municipal corporation in respect of its legislative functions, and the duty or the liability of turnpike companies, or other private corporations aggregate. And the same may be said of the duty of commissioners of highways, and like public officers, clothed with adequate power for the performance of some plain executive or ministerial duty.

As to the argument that the common law imposes upon the corporation the duty and liability in question; we are unable to appreciate it

Nor do we understand, that as a corporation, it is subjected *per se*, to the duty of keeping swine out of the streets.

We have had occasion frequently to hold the city liable for the negligence and misfeasance of its officers and agents; but the principle of that liability, has no application here.

Waiving the consideration of the other objections to the action, which are presented by the demurrers, we must decide, that the suit cannot be maintained.¹

Judgment for the defendants.

EASTMAN v. MEREDITH.

1858. 36 *New Hampshire*, 284.²

PERLEY, C. J. The following may be taken for a general statement of the case set up by the plaintiff. The town of Meredith built a town-house, to be used for holding town-meetings and other public purposes. The house, by the default and negligence of those who built it in behalf of the town, was so improperly constructed that the flooring gave way at the annual town-meeting in 1855, and the plaintiff, an inhabitant and legal voter, in attendance on the meeting, received a serious bodily injury. The accident and injury were caused by the defects and insufficiency of the building.

Assuming that it was the duty of the town to provide a safe and suitable place for holding town-meetings, the question will remain, whether a citizen of the town, who suffers a private injury in the exercise of his public rights from neglect of the town to perform this public duty, can maintain an action against the town to recover damages for the injury?

Towns in this State are declared by statute to be corporations, and consequently may sue and be sued in reference to all their legal rights and liabilities. But declaring them to be corporations cannot confer upon them other powers or subject them to other duties than those which are conferred and imposed either by express provision of some statute, or are implied from the general character and design of such public corporations. *Hooper v. Emery*, 14 Maine 377.

We have no statute which gives an action against a town for an injury like that complained of in this suit; but the general position taken for the plaintiff is this: The town is a corporation; it was a public duty of the town to provide a safe and proper place for holding the annual town meetings; the plaintiff has suffered a private injury from neglect of the town to perform this public duty, and the law holds a corporation liable to an individual for any private damage that he may suffer from neglect of the corporation to perform a public duty.

¹ See *Culver v. Streater*, 180 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; *O'Rourke v. Sioux Falls*, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760; *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883; *Hagerstown v. Klotz*, 93 Md. 437, 49 Atl. 836.

² Arguments omitted.—Ed.

Town meeting

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In considering the authorities which have been relied on to sustain the general position of the plaintiff, it may be well to distinguish the different classes of corporations that have public duties to perform, and advert to the grounds upon which, in different cases, the legal liability for neglect to perform the public duty has been held to rest.

Private corporations, by the conditions, express or implied, upon which they hold their corporate powers, are frequently charged with the performance of public duties; and where a private corporation, like a turnpike, a canal, or a railroad, accepts a grant of corporate powers upon condition of performing a public duty, and an individual suffers a private damage from neglect of the corporation to perform the public duty, it is well settled, upon the authority of numerous cases, that he may maintain an action against the delinquent corporation, to recover his damages. A large proportion of the cases cited for the plaintiff are of this character.

So in England, where a public duty is imposed on a municipal corporation as a condition upon which the corporate franchises or corporate property have been granted; or where the corporation holds its franchises or property by a prescription from which a grant on like condition may be inferred, it has been held that any individual may maintain an action against the corporation to recover damages for an injury which he has suffered from neglect to perform the public duty. In *Henley v. Lyme Regis*, 5 Bingham 91, *S. C. in Error*, 3 B. & Adol. 77, and 1 Bingham N. C. 222, the corporation held their franchise of a borough, and also a pier or quay, with the right to take tolls under a grant from the crown, in which they were directed to repair a sea wall; and it was held that the plaintiff might maintain an action to recover damages which he had sustained by the neglect of the corporation to repair the wall. In that case, 1 Bing. N. C. 222, it was said that where a matter of general and public concern is involved, "and the king, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action." In the *Mayor of Lyme in Error v. Turner*, Cowper 87, the corporation had immemorially repaired and cleansed a creek, and the plaintiff maintained his action against the corporation for damage caused by interruption of the navigation of the creek for want of cleansing and repairing. In that case it was said by Lord Mansfield that as the defendants were bound by the prescription to repair, "it might be the very condition and terms of their creation or charter." In these cases the right to maintain the civil action appears to be placed on the ground that the municipal corporation accepted the grant of their franchises or their property from the crown upon the condition of performing the public duty, and were parties to a contract with the government in the same way as private corporations are, which accept the grant of corporate powers upon similar conditions.

It is also to be observed that municipal corporations in England are broadly distinguished in many important respects from towns in this and the other New-England States. There is no uniformity in the powers and duties of English municipal corporations. They are not created and established under any general public law, but the powers and duties of each municipality depend on its own individual grant or prescription. Their corporate franchises are held of the crown by the tenure of performing the conditions upon which they have been granted, and are liable to forfeiture for breach of the conditions. They indeed answer certain public purposes, as private corporations do, which have public duties to perform, and some of them exercise political rights. But they are not, like towns, general political and territorial divisions of the country, with uniform powers and duties, defined and varied, from time to time, by general legislation. Towns do not hold their powers ordinarily under any grant from the government to the individual corporation; or by virtue of any contract with the government, or upon any condition, express or implied. They give no assent in their corporate capacity to the laws which impose their public duties or fix their territorial limits. In all that is material to the present inquiry, municipal corporations in England bear much less resemblance to towns in this country, than to private corporations which are charged with the performance of public duties, and for this reason the English authorities on the subject are but remotely applicable to the present case.

Grants are sometimes made to particular towns or cities, of special powers, not belonging to them under the general law; and there is a class of cases, in which towns and cities have been held liable to civil actions for damages caused by neglect to perform public duties growing out of the grant of such special powers: as the power to bring water by an aqueduct for public use by those who pay a compensation for it; to light the place with gas, on the same terms, or to make and maintain sewers at the expense of adjoining proprietors. Thus in *The Mayor, &c., of New-York in Error v. Furze*, 3 Hill 612, the city was empowered by a special act to lay down and maintain sewers, and charge the expense upon owners and occupants of houses and lots intended to be benefited; and it was held that an individual might maintain an action against the city to recover damages for a private injury which he had suffered from neglect of the city to keep the sewers in proper repair. The distinction between the liability of towns and cities for neglect to perform public duties growing out of the powers which they exercise under the general law, and their liability when the duty arises from the grant of some special power conferred on the particular town or city, is recognized or explained in *Bailey v. The Mayor, &c., of New-York*, 3 Hill 531.

The decision in *Lloyd v. The Mayor, &c., of New-York*, 1 Selden 374, is put upon this distinction, between a duty arising from the grant of a special power, and a duty implied from the exercise of political

rights under the general law. "The corporation of the city of New York," it is said in that case, "possess two kinds of powers, one governmental and public, and, to the extent *they* are held and exercised, is clothed with sovereignty; the other, private, and, to the extent *they* are held and exercised, is a legal individual. The former are given and used for public purposes; the latter, for private purposes; while in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter, a legal individual." "The rules of law are clear and explicit which establish the rights, immunities and liabilities of the appellants, when in the exercise of each class of powers."

In some of the cases in which cities have been held liable to a civil action for neglect to perform public duties, growing out of grants conferring special powers and privileges, stress appears to have been laid on the circumstance that the city derived a direct pecuniary profit from the grant, in the shape of a toll or rent. But in other cases, where no benefit of that kind was derived from the grant, cities have been held liable, and the decision has been put on the ground that the grant of special powers, though not the source of any direct pecuniary profit, was yet in the nature of a special privilege or immunity, granted for the particular local advantage of the city, and placed the corporation on the same footing of liability as if the benefit were in the shape of a rent, or toll, or other pecuniary income; that the grant was made and *accepted* on the same implied condition of performing the public duties growing out of it, as if it had afforded a direct profit in money.

In *Mears v. The Commissioners of Wilmington*, 9 Iredell 73, the corporation were sued for undermining a brick wall in grading a street, under authority conferred on the town by sundry special acts of the Legislature, and were held liable to the action. In that case the court say, "when the sovereign grants power to a municipal corporation to grade the streets, the grant is made for the public benefit, and is *accepted* because of the benefit which the corporation expects to receive, not by making money directly, but by making it more convenient for individuals composing the corporation or town to pass and repass in the transaction of business, and to benefit them by holding out greater inducements for others to frequent the town. The only distinction is that in one case the money is received directly, in the other indirectly. But in both cases the individuals composing the stockholders," (that is, in the private corporation,) "and the citizens of the town, derive special benefit from the work." *Cunliffe v. The Mayor, &c., of Albany*, 2 Barb. Sup. Ct. 190, would seem to fall into the same class of cases. There the city claimed authority under a special act to improve the navigation of Albany Basin, and to maintain a bridge; and having altered the construction of the bridge under authority of the act, were decided to be liable to the plaintiff for an injury caused by the bridge while he was on it. So of *Rochester White Lead Co. v. The City of Rochester*, 3 Comstock 463, and *Clark v. Washington*, 12 Wheaton 40.

In such cases the special powers thus granted are not held by the particular town or city under the general law, and as one of the political divisions of the country. The public duty grows out of the special grant of power; and, though held and exercised by a town or city, the nature of the power granted is the same as if a like power had been conferred on a private corporation created to answer the same public object, and the cases above referred to hold the town or city liable to a civil action for neglect to perform a public duty arising from the grant of the special power in the same way, and, as I understand them, upon the same grounds and reasons, as private corporations are held, which are clothed with the same powers and bound to the performance of the same public duties. So far as I have had opportunity to examine this class of cases, they appear to go upon the ground that the special power, though no direct pecuniary profit may be derived from it, is granted as an immunity and peculiar privilege, for the benefit of the particular town or city, and is accepted, as in the case of a private corporation, upon the implied condition of performing the public duties imposed by it and growing out of it. *Henley v. Lyme Regis*, 1 Bing. N. C. 222; *Mears v. Wilmington*, 9 Iredell 73; *Mayor, &c., of New-York v. Bailey*, 2 Denio 456.

This distinction between corporations that voluntarily accept the grant of special powers from the government, and the inhabitants of any district who are by statute invested with particular powers without their consent, is stated and relied on by *Parsons*, C. J., in the early case of *Riddle v. Locks and Canals*, 7 Mass. 187, and is recognized in *Sears v. The Turnpike*, 7 Ct. 9.

The case of *Pittsburg City in Error v. Grier*, 22 Penn. 54, cited for the plaintiff, stands upon grounds which clearly distinguish it from the present. The city, in that case, was in possession of a public wharf, exercising an exclusive supervision over it, and receiving tolls for its use; and the plaintiff sustained a special injury from the neglect of the city to keep the wharf in order. *Black*, C. J., delivering the opinion of the court, says, "The rule undoubtedly is, that those who have a public work under their control are bound to repair it, and the force of this obligation is still further increased when it yields its possessors a revenue. The cases above cited show that this principle applies to public ports in possession of a city, as well as canals, bridges and other highways in the hands of individuals and private corporations." "The injury is a violation of the duty which arises out of the control which the city has over the port, and her receipt of tolls from the vessels which come into it." The case is thus put distinctly on the ground that the public duty which was the foundation of the action arose out of the control which the city exercised over the wharf and the income received for the use of it.

In several of the cases cited for the plaintiff, cities and towns have been held liable for private injuries done by them in the course of executing works which they were by law authorized to perform. In

Scott v. The Mayor and Aldermen of Manchester, 37 Law & Eq. 495, by the carelessness of workmen whom the defendants employed in laying gas-pipes, a piece of metal was thrown into the plaintiff's eye, and the city was held to be liable. So in *Delmonico v. The Mayor, &c., of New-York*, 1 Sanford 222, an action was maintained for damage suffered by the plaintiff from the negligence of the defendants in the process of constructing a sewer. The remarks of the court in *Anthony v. Adams*, 1 Met. 285, are to the point, that an action may be maintained against a town in such a case. The plaintiff, in cases of this character, does not recover on the ground that he has been denied any public right which the corporation owed to him as a citizen of the town, or because he has suffered an injury in the exercise of a public right, from neglect of the town to perform a public duty. The corporation being authorized by law to execute the work, if, in their manner of doing it, they cause a private injury, they are answerable in the same way and on the same principle as an individual who injures another by the wrongful manner in which he performs an act lawful in itself. It has been sometimes made a question, whether in the particular case the corporation were liable as principals for the conduct of those who performed the work on their account; but where a work is once conceded to be done by the corporation, it would seem to be clear, on authority and general principles, that a corporation, public or private, must be held liable like an individual for injuries caused by negligence in the process of executing the work.

Then, again, towns and other municipal corporations, including counties in this State, have power, for certain purposes, to hold and manage property, real and personal; and for private injuries, caused by the improper management of their property, as such, they have been held to the general liability of private corporations and natural persons that own and manage the same kind of property. *Bailey v. The Mayor, &c., of New-York*, 3 Hill 541. So far as they are the owners and managers of property, there would seem to be no sound reason for exempting them from the general maxim which requires an individual so to use his own that he shall not injure that which belongs to another. So if a town or city maintain an erection or structure which is a private nuisance, and causes a special damage, or, in the performance of an authorized act, invade any right of property, the corporation has been held liable to a civil action. *Thayer v. Boston*, 19 Pick. 511; *Akron v. McComb*, 18 Ohio 229; *Rhodes v. Cleveland*, 10 Ohio 159. If the defendants in the present case had laid and maintained the foundations of their town-house across a stream, and caused the water to flow back on the plaintiff's land, according to these authorities they would have been liable to an action for the damage.

/// The case of the plaintiff cannot be classed with any of those to which we have adverted. The question here is, whether a town is liable to the action of a citizen of the town who has suffered a special damage from neglect of the town to provide a safe place for holding

the annual town-meeting. The public duty relied on is not enjoined by express provision of any statute. If such a duty exists, it is implied from the general character and design of such *quasi* corporations, and must depend on the general law applicable to all towns. Here is no contract, express or implied, between the State and the individual town, and no grant of any special power or privilege which can be supposed to have been voluntarily accepted by the town upon condition of performing the public duty. Towns are involuntary territorial and political divisions of the State, like counties, established for purposes of government and municipal regulation. It is chiefly through this organization of towns that the people exercise the sovereign power of government; and the plaintiff's claim is for damages which he has suffered from neglect of the town to provide him a safe place for the exercise of his public and political rights as a citizen of the town and State. Among the numerous authorities which the laudable industry of the plaintiff's counsel has brought to our notice, I have not found one which goes the length of holding that an action can be maintained in a case like this. The cases cited that come nearest the present are perhaps those in which it has been held that a town or city is liable for a private damage caused by neglect to perform a public duty growing out of the grant of some special power. But those cases cannot be regarded as authorities in point, because they appear to have been decided upon a distinction between the exercise of such special powers, and the exercise of the general powers which belong to all towns as mere public and political divisions of the country, and upon the ground that the special powers thus granted to the individual town or city were in the nature of privileges accepted upon the implied condition of performing the public duties growing out of them. On the other hand, there is a great weight of authority to show that towns in New-England are not liable to a civil action in a case like this.

In *Riddle v. The Locks and Canals*, 7 Mass. 169, 187, the case of *Russell v. The Men of Devon*, 2 T. R. 667, is cited as an authority applicable to towns and counties in Massachusetts; and in *Mower v. Leicester*, 9 Mass. 250, it was held that towns are not liable to a civil action for neglect to perform public duties imposed on them, unless the action were given by some statute, and *Russell v. The Men of Devon* was again recognized as applicable to the case of towns. *The Merchants' Bank v. Cook*, 4 Pick. 114; *Tisdale v. Norton*, 8 Met. 292; *Holman v. Townsend*, 13 Met. 300, and *Brady v. Lowell*, 3 Cushing 124, are to the same point.

In *Adams v. Wiscasset Bank*, 1 Greenl. 361, *Mellen*, C. J., cites from *Riddle v. The Locks and Canals* the remarks of C. J. *Parsons* on this subject, and adds, "No private action, unless given by statute, lies against *quasi* corporations for breach of a corporate duty." And other cases in Maine would seem to show that the rule as above stated is well established in that State. *Hooper v. Emery*, 14 Maine 377; *Reed v. Belfast*, 20 Maine 248; *Sanford v. Augusta*, 32 Maine 536.

We understand the same rule to prevail in Vermont. In *Barter v. The Winooski Turnpike*, 22 Vt. 123, *Bennet, J.*, in delivering the opinion of the court, says, "I take it to be well settled that if the statute had not given the action, no individual who had sustained a special damage through neglect of the town to repair their roads, could maintain a suit. It may be said that where an individual sustains an injury by the neglect or default of another, the law gives a remedy; but that principle does not apply where the public are concerned." And the same general doctrine is affirmed in *Hyde v. Jamaica*, 27 Vt. 443.

In Connecticut it is held that no action will lie for injuries caused by defects in a highway, unless given by statute. *Chedsey v. Canton*, 17 Conn. 475.

In *Furnum v. Concord*, 2 N. H. 392. *Richardson, C. J.*, says, "No action lies at common law against towns for damages sustained through defects in highways." He cites, as authorities for his position, *Monce v. Leicester*, and *Russell v. The Men of Devon*, and, after quoting the provision of our statute which gives an action for special damages caused by insufficiency of highways, he adds, "And the question is, whether any damage has happened to the plaintiff in this case by means of the insufficiency or want of repairs of the highway in question, within the intent and meaning of this statute." The right to recover against the town is thus placed entirely on the statute.

It is said in argument that the authority of these New-England cases is much weakened by the circumstance that they may all be referred for their origin to *Russell v. The Men of Devon*, and that the reasons assigned for the decision in that case are not applicable to our towns. There is certainly no such exact resemblance between counties in England and our towns, as will make all the reasons upon which the court in that case placed their decision applicable to towns in this State. Counties in England are, however, territorial and political divisions of the country, as counties and towns are here; they are *quasi* corporations, so far as to be liable to public prosecution for neglect to perform their public duties; and the reason that the county had no corporate fund out of which the plaintiff's judgment could be paid, would seem to be as strong against maintaining an indictment as a civil action; for it is not easy to see how the want of a corporate fund would make it more difficult to collect a judgment recovered by an individual, than to levy a fine assessed after conviction on an indictment. That is indeed admitted in the judgment of the court, and the liability of a county to indictment put on the ground of authority and unbroken usage. And the doctrine of that case has been adopted and applied to towns in numerous instances, by judges who must certainly be reckoned among the most eminent jurists that New-England has produced: by *Parsons* and *Shaw* in Massachusetts, by *Mellen* and *Shepley* in Maine, and by our own learned and excellent Chief Justice *Richardson*, in this State; names which carry with them an irresistible

weight of authority on all legal questions, and especially on one like the present; for no men in the country have been more familiarly acquainted with the whole legal history of towns in New-England, and all the traditions of the law in relation to them.

A manuscript case of *Wheeler v. Troy* has been shown to us, in which it is understood to have been decided, in December, 1848, at the term of the Superior Court for Cheshire county, that towns in this State are liable to an action for damages caused by defect of highways, independent of the statute which gives the action. Taking that case to be correctly reported and to have been correctly decided, it is far from coming up to the present. The duty to repair highways is especially enjoined upon towns by statute, for the common benefit of all who have occasion to use them. It is not a public duty, supposed to be devolved upon towns to enable their own citizens to exercise and enjoy their public and political rights, like that on which the plaintiff relies in this case.

We find, however, upon inquiry, that this case of *Wheeler v. Troy* was decided by two only of the three judges then on the bench, in the absence of Mr. Justice Woods, whose opinion on a question of this kind would have added great weight to the authority of the case; and we have no information that he then concurred or now concurs in the decision. The case has remained long without any published report, and has received no confirmation from recognition in any subsequent decision, or from the acquiescence of the legal profession; and, indeed, the manuscript report of the case fails to afford evidence that it was decided after so careful and thorough a consideration as was usual with that court; and, if an occasion should hereafter arise to require it, we should feel quite at liberty to reverse the decision; but we do not find ourselves called on to do it at this time.

A distinction has been suggested in argument, between an omission or total neglect to perform a public duty, and negligence in the manner of performing it. It has been contended that though the town might not be liable for damages caused by omission to perform the duty, they would be for an injury caused by the negligent and improper manner of performing it. There are doubtless cases where a party who is under no legal obligation to perform an act or service, is yet liable for damages caused by his negligence, if he voluntarily enters upon the performance of it. But our discussion of this case has gone on the assumption that it was the duty of the town to provide a safe and suitable place for holding the town-meeting; and we are unable to perceive any distinction in principle between a claim to recover damages for a total neglect to perform an admitted public duty, and for neglect to perform it properly and with due care, when the injury complained of happens to the plaintiff in the exercise of his public rights as a citizen of the town. The duty is not performed unless it is properly performed. In both cases the town has neglected to perform, or failed to perform, the public duty which they owed to the plaintiff and other citizens.

We see no reason to question the authority of towns to build and own town-houses, to be used for holding town-meetings and other public purposes. But it by no means follows as a necessary consequence that it is the duty of towns to provide houses of their own for such purposes. And even where the town is provided with a town-house, we are not required, in the view which we take of this case, to say whether the duty to see that the house is in proper order for public use rests on the town in a corporate capacity, or on the officers of the town. There is no statute that requires town meetings to be held at the town-house, even in cases where the town owns such a building. On the contrary, the warrant of the selectmen notifying the meeting is by the statute "to prescribe the place." If the town-house were known at the time to be in an unsafe condition, it would hardly be contended that their duty would require the selectmen to notify the meeting to be held there. It may perhaps be found, when the question shall be considered, that it belongs to the town officers, and not to the town in a corporate capacity, to see that the town meetings are held in a safe and suitable place.

We regard the present case as one of new impression. We have heard of no earlier attempt in this State to maintain an action against a town, for a private injury suffered by a citizen of the town from neglect of the town to provide him with safe and suitable means of exercising his public rights, and we are not informed of any case in which such an action has been maintained in any other State. We believe it to have been the general understanding of the profession in this State, that an action will not lie against a town for neglect to perform a mere public duty, unless the action is given by statute. The authorities cited in support of the plaintiff's action are very distinguishable, as we think, from the present case, and there is a great weight of authority on the other side.

Our conclusion is, that this action, on the case stated to us, cannot be maintained.¹

BUTTRICK v. CITY OF LOWELL.

1861. 1 *Allen (Massachusetts)*, 172.²

TORT for an assault and battery.

A city ordinance provides, that "three or more persons shall not stand together or near each other in any street in the city in such manner as to obstruct a free passage therein for passengers." While the plaintiff was standing peaceably, and talking with only one other person, upon the sidewalk, and interrupting no one in the proper use of the same, two police officers of the city of Lowell ordered him off,

¹ See *Snider v. St. Paul*, 51 Minn. 466, 53 N. W. 763; *Kelly v. Boston*, 186 Mass. 165, 71 N. E. 290, 66 L. R. A. 429; *Fox v. Philadelphia*, 208 Pa. 127, 57 Atl. 356, 65 L. R. A. 214.

² Statement abridged.—Ed.

cf. Levy v. N. Y.

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and, upon his refusing to go, assaulted, arrested, and imprisoned him; claiming that by so doing they were only performing their official duty. The plaintiff brought an action of tort against the policemen for false arrest and assault and battery. The policemen attempted to justify their proceeding under the above city ordinance. The plaintiff recovered judgment against the policemen for \$500; which judgment remains unsatisfied. The city of Lowell authorized its solicitor to appear in the defence of said suit, and paid him for trying the same. The plaintiff now brings the present action against the city, to recover damages for said assault by the police officers.

Upon an agreed statement, setting forth substantially the foregoing facts, a nonsuit was ordered. Plaintiff appealed.

B. F. Butler, for the plaintiff. The rule regulating the liability of a municipal corporation seems to be this: (1.) no liability exists for the negligence of public officers over whom it has no control save in their appointment; (2.) liability does exist, under the doctrine of *respondeat superior*, in all cases in which the servant is in the direct execution of a trust or order of the city or town, within the scope of its authority, or upon any matter upon which it may make by-laws. *Cushing v. Stoughton*, 6 Cush. 389. *Thayer v. Boston*, 19 Pick. 511. *Perry v. Worcester*, 6 Gray, 544.

T. H. Sweetser, for the defendant.

BIGELOW, C. J. This case must be governed by the decisions in *Hafford v. City of New Bedford*, 16 Gray, 297, and *Walcott v. Swampscott*, ante, 101. Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are intrusted, are derived from the law, and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties the city or town cannot be held liable.

Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as the agents or servants of the city.

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The facts relied on in this case to show a ratification or adoption by the city of the acts of the police officers cannot have that effect. They are entirely consistent with a belief on the part of the mayor and other agents of the city that the police officers had committed no unlawful invasion of the plaintiff's rights. *Perley v. Georgetown*, 7 Gray, 464.

outside scope of authority

It may be added that, if the plaintiff could maintain his position that police officers are so far agents or servants of the city that the maxim *respondet superior* would be applicable to their acts, it is clear that the facts agreed would not render the city liable in this action; because it plainly appears that, in committing the acts complained of, the officers exceeded the authority vested in them by the by-law of the city.¹

Judgment for the defendants.

GILBOY ET AL. v. CITY OF DETROIT.

Supreme Court of Michigan. December 7, 1897.²

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GRANT, J. This is an action of tort. The declaration alleges that plaintiff kept a boarding house; that he received a boarder in the usual course of business; that said boarder had been exposed to small-pox at the Merchant's Hotel in the city of Detroit; and that through the negligence of the Board of Health said person was permitted to go at large instead of being confined; that it was the duty of the Board of Health, under the charter and ordinances of the city, to examine the person at the Merchant's Hotel, determine whether she had small-pox, and, if she had, to remove her to a pest house or hospital; that the person received into plaintiff's boarding house was taken down with small-pox while there, and he in consequence suffered loss and damage.

A demurrer was interposed and sustained by the Court.

The record presents the sole question: Is a municipality liable for the negligence of officers of the Board of Health in the performance of their duty? Counsel for the plaintiff cite no authorities to support their contention, and probably for the very good reason that none can be found. The authorities universally hold to the contrary. The universal rule is that such boards and officers are not acting for private but for public purposes; they represent the entire state through the municipality, a political division of the state; and municipalities, in the absence of express statutes fixing liability, are not liable for the negligence of such officers and boards. *Maxmilian v. Mayor*, 62 N. Y. 160; *Richmond v. Long's Admrs.*, 17 Grat. 375;

¹ See *La Clef v. Concordia*, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 235; *Kansas City v. Lemen*, 57 Fed. 905.

² From copy of opinion furnished by Clerk of Supreme Court. — Ed.

Brown v. Vinalhaven, 65 Me. 402; *Barbour v. Ellsworth*, 67 Me. 294; *Mead v. New Haven*, 40 Conn. 72; *Ogg v. Lansing*, 35 Ia. 495; *Shelbourne v. Yuba*, 21 Cal. 113; *Detroit v. Blackeby*, 21 Mich. 84; *Hill v. Boston*, 122 Mass. 344; 2 Dill. Corp. sec. 965.

Brown v. Vinalhaven is the counterpart of this in its facts.

The rule is so clearly stated by Justice Folger in *Maxmilian v. Mayor* that we quote it: "There are two kinds of duties which are imposed upon a municipal corporation: one is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes. The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for any injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user, nor for mis-user by the public agents."

Judgment affirmed.

McDADE v. CITY OF CHESTER.

1888. 117 Pa. State, 414.¹

ACTION on the case against the city of Chester, to recover damages for personal injury received by the plaintiff, from the explosion of a manufactory of fireworks, operated in that city. The manufactory was the individual property of the operator, and was located upon his ground. The case came before the court upon a demurrer to the declaration. The plaintiff, in the declaration, alleged in substance that it was the duty of the city to have suppressed this manufactory of fireworks; that this duty was neglected; and that, in consequence of this neglect, the plaintiff received his injuries.

By the special act of incorporation, the mayor and councils of the city were empowered to make all such by-laws and ordinances "as they may deem necessary to preserve the peace and promote the good order, government, and welfare of the said city, and the prosperity and happiness of the inhabitants thereof." By subsequent acts they were empowered to prohibit the manufacture of fireworks; to prohibit and

¹ Statement abridged. Arguments omitted. — Ed.

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remove any nuisance, whether on public or private ground; and to cause the removal of any nuisance "by such means as to them shall seem best."

The court below gave judgment for defendant on the demurrer.

Plaintiff brought error.

John V. Rice (Garnett Pendleton with him), for plaintiff in error.

Orlando Harvey, for defendant in error.

CLARK, J. [After stating the facts, and citing authorities applicable to a case where "a legal duty has been imposed by statute upon a municipal corporation."] But the duty imposed must be absolute or imperative, not such as under a grant of authority is intrusted to the judgment and discretion of the municipal authorities; for it is a well settled doctrine that a municipal corporation is not liable to an action for damages, either for the non-exercise of, or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character. *Dillon Mun. Corp. § 949.*

It is likewise true that when a power is given to do an act which concerns the public interest, the execution of the power, when applied to a public officer or body, may be insisted upon as a duty, although the phraseology of the statute be permissive only; especially is this so when there is nothing in the act save the permissive form of expression to denote that the legislature designed to lodge a discretionary power merely. But where the power is lodged with persons exercising, or to exercise, legislative or judicial functions, and the subject-matter of the statute and its phraseology concur in showing that the authority is essentially discretionary, no absolute duty is imposed. The true rule is very correctly stated in our own case of *Carr v. Northern Liberties*, 85 Pa. 330, as follows: "Where any person has the right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty; but where the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed."

The language of the several statutes above referred to is plainly permissive only. . . . It is plain, we think, that all the various matters mentioned in the eighth section, including the prohibition and abatement of nuisances, were given into the control of municipalities as proper subjects for legislation in the government of the city; and as such action necessarily involves the exercise of discretion, no absolute duty was imposed or intended to be imposed by the legislature. The whole question is one of legislative intention, and we find nothing in these several statutes to indicate that the legislature meant more than is plainly expressed.

There can be no doubt whatever that the municipal authorities of the city of Chester had full power to act in the premises. They had undoubted authority either to limit or to prohibit altogether the manufacture, sale or exposure of fire-works within the corporate limits, and to provide such safe-guards for the security of its citizens as in their judgment might be necessary. This subject-matter had been especially intrusted to their judgment and discretion in the charter and acts of assembly mentioned; but certainly no person had any right to demand the exercise of this power in any particular way or to any greater extent than the mayor and councils, in good faith and in the exercise of their discretion, might see proper to provide.

Judgment affirmed.

WYATT v. ROME. 165

1898. 105 Ga. 312.

ACTION for damages. Before Judge Harris. City court of Floyd county. December term, 1897.

By ordinances of the City of Rome, every resident of that city was required to be successfully vaccinated, or to be vaccinated a sufficient number of times to make it evident that successful vaccination was impossible; and upon failure or refusal of any resident over fifteen years of age to be so vaccinated, it was provided that he should be punished by fine or imprisonment. At council meetings in August, 1897, it was ordered that these ordinances be immediately enforced and be published; and that five physicians be employed to assist the city physicians in vaccinating all persons who had not been vaccinated. During the same month one of the physicians so employed approached the plaintiff in this case, and insisted that plaintiff show his arm, which plaintiff did. He said plaintiff would have to be again vaccinated, and on his objecting, informed him that he would have to submit, under penalty of the city ordinance. Plaintiff then submitted to the vaccination, under protest. He contends that the city thereupon used upon his arm vaccine matter which was bad, poisonous and injurious, and from which blood poison resulted, to his great damage; that the city bought and furnished to said physician the vaccine matter that was so used, which when brought to the city was not marked with the name of any manufacturer; that all such matter unbranded with the name of a manufacturer is suspicious, usually impure and unsound, and universally known to be impure; and that the city was negligent in using the same. This action was brought to recover damages for the injury; but the court dismissed it on demurrer.

LEWIS, J. The right to prescribe regulations looking to the preservation of the public health is one of those sovereign powers that belong to the State. This power can be delegated by the State to any of its subdivisions of government, such as a municipality or a county, and in the use of it by such subdivisions they are in the exercise of a function purely governmental. As a general rule a subordinate branch of the government is not liable for injuries sustained by any one growing out of negligence, misfeasance, or nonfeasance of its officers and agents who are charged with the duty of enforcing laws or ordinances enacted for the public good in the exercise of a governmental function, and not in the exercise of a private franchise. The exceptions to this general rule are not founded so much upon principle as judicial precedents. The rule itself is based upon a principle as old as English law, that "the King can do no wrong." It is upon this idea that the sovereignty of a State protects it against suits by its subjects, no one having a right to hold it liable for any act of its officers or agents, unless such right is expressly granted by the State itself. When a municipality exercises a governmental power conferred upon it by the State, it is just as if the State itself were in the exercise of the function thus conferred. Among the precedents which have been established by courts of last resort, that are apparently exceptions to this general rule, we have been able to find none that would hold a city liable for any injury that may be sustained as the result of enforcing measures legally enacted for the promotion and preservation of the public health. On the contrary, authority is abundant and almost limitless establishing the non-liability of a municipality in such cases. We do not think this is an open question in this State, for it has practically been decided in the case of *Love v. Atlanta*, 95 Ga. 129. The reasoning for the decision in that case given in the lucid opinion of Justice Atkinson follows the uniform trend of judicial expression, and is especially applicable to the case at bar. On page 183, he says: "If the State delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the State, and in the exercise of such powers is entitled to the same immunity against suit as the State itself enjoys." Upon the same line, and practically in point, we cite the following as a few of the many decisions and authorities on this subject. 15 Am. & Eng. Enc. L. 1164-5, with citations; 2 Dill. Mun. Corp. § 977; Tied. Mun. Corp. § 332; *Sherbourne v. Yuba County*, 21 Cal. 113; *Summers v. Commissioners*, 103 Ind. 262, in which it is decided that "Counties are instrumentalities

of government, and are not liable for injuries caused by the negligence of the commissioners in the selection of an unskilful or incompetent physician for the care of the poor"; *Ogg v. Lansing*, 35 Iowa, 495, in which it is ruled that "A city is not liable for the negligence of its officers or agents in executing sanitary regulations, adopted for the purpose of preventing the spread of contagious disease, or in taking the care and custody of persons afflicted with such disease, or the houses in which such persons are kept." The city in the present case was in the exercise of a most important function of government in which not only the inhabitants of the city but the public at large were interested. The measure in question which it adopted looked to the prevention of the spread of a contagious and serious malady with which it was at the time perhaps threatened. To allow any citizen a right of action on account of injuries real or supposed that he may have suffered in the interest of the public good would be to paralyze the arm of the municipal government, and either render it incapable of acting for the public weal, or would render such action so dangerous that the possible evil consequences to it, resulting from the multiplicity of suits, might be as great as the small-pox itself. Hence the wisdom of the law in exempting it from liability on such an alleged injury as is set forth in the petition. It was not contended, either in the pleadings or argument, that the City of Rome did not have the right to pass the ordinance requiring its citizens and residents to submit to vaccination. On the contrary, the suit was not based on any alleged want of authority in the city to legislate on the subject, but solely on the negligent manner in which the city, through its officers and agents, enforced this ordinance.

Judgment affirmed. All the Justices concurring.

HALEY v. BOSTON. 166

1906. 191 Mass. 291.

SHELDON, J. This is an action of tort brought to recover for personal injuries alleged to have been received by the plaintiff through the negligence of the driver of a cart belonging to the defendant. The driver drove the cart over the plaintiff's leg and broke it. There was evidence of the plaintiff's due care and of the driver's negligence. The judge ordered a verdict for the defendant, and the only question now raised by the plaintiff's exceptions is whether the defendant can be held to be responsible for the driver's negligence.

The driver was employed by the sanitary division of the street department of the city. This division moved garbage, house offal and ashes from buildings in the city, without charge, except that a fee of ten cents a barrel, just enough to cover the expenses of removing

had ashes
in houses

them, was charged for removing steam engine ashes. No charge was made for removing ashes from dwelling houses. From removing engine ashes, the city received an income of something over \$10,000 a year, and between \$2,000 and \$3,000 a year from the letting of space on scows of this division to various persons for the removal of offal and waste matter, the sale of manure and the rent of part of a wharf. The total expenses of this division above income were \$623,000. The cart which ran over the plaintiff was loaded with ashes taken from dwelling houses, and there were no steam engine ashes upon it.

The Revised Ordinances of 1898 of the city of Boston put in evidence provide in c. 1, § 8, that the various departments are "placed under the charge of the officers or boards designated therefor, under the general supervision and control of the mayor"; and in c. 38, § 1, that the street department, among other things, "shall remove from yards and areas, when so placed as to be easily removed, all ashes accumulated from the burning of materials for heating buildings or for domestic purposes, all house dirt, house offal, and all noxious and refuse substances." The ordinances also provide in c. 47, § 18, that "no person, other than employees of the city engaged in public work, shall, in any street, carry house dirt, house offal or other refuse matter, except in accordance with a permit from the board of health."

The general rule is well settled in this Commonwealth that a city or town which voluntarily undertakes work of a commercial character, from which it seeks to derive revenue or other special advantage, is liable like a private employer for the negligence of its servants or agents who are engaged therein. *Duggan v. Peabody*, 187 Mass. 349. *Little v. Holyoke*, 177 Mass. 114. *D'Amico v. Boston*, 176 Mass. 599. *Lynch v. Springfield*, 174 Mass. 430. So, too, if it has chosen to take the work of repairing or constructing a street or bridge out of the charge of the officers designated by law, and itself to assume direct control of the work, it may be held liable for the negligence of the servants or agents whom it employs for that purpose. *Butman v. Newton*, 179 Mass. 1. *Collins v. Greenfield*, 172 Mass. 78, 81. *Doherty v. Braintree*, 148 Mass. 495. *Waldron v. Haverhill*, 143 Mass. 582. *Deane v. Randolph*, 132 Mass. 475. *Hawks v. Charlemont*, 107 Mass. 414. So it may be held for negligence in the construction of water works or the laying of water pipes. *Lynch v. Springfield*, 174 Mass. 430. *Fox v. Chelsea*, 171 Mass. 297. *Stoddard v. Winchester*, 157 Mass. 567. *Perkins v. Lawrence*, 136 Mass. 305. *Hand v. Brookline*, 126 Mass. 324. Like liability has been held to exist in the case of appliances and supplies used for the lighting of streets, on the ground that one of the purposes aimed at, at least incidentally, is to facilitate the use of the public ways for which the city is responsible, and to guard against the liability that might exist for accidents caused by any defect therein. *Dickinson v. Boston*, 188 Mass. 595. *Sullivan v. Holyoke*, 135 Mass. 273. Many of these cases have been put on the ground

that the enterprise engaged in was partly of a commercial character, from which revenue or other advantage was expected to be realized. And where this element exists, liability has been maintained although the work engaged in was only partly of the nature of a business enterprise, being incidental both to public and to commercial undertakings. *Davies v. Boston*, 190 Mass. 194, decided since this case was argued. *Duggan v. Peabody*, 187 Mass. 349. *Collins v. Greenfield*, 172 Mass. 78. *Neff v. Wellesley*, 148 Mass. 487. *Oliver v. Worcester*, 102 Mass. 489. The liability for negligence in the construction or maintenance of sewers comes under this doctrine. *Manning v. Springfield*, 184 Mass. 245. *O'Brien v. Worcester*, 172 Mass. 348. But these exceptions never have been held in this Commonwealth to affect the general rule that a city or town is not to be held to any liability for the negligence of persons employed by it in work merely of a public character required or authorized to be done and undertaken without compensation in the performance of a public duty. *Taggart v. Fall River*, 170 Mass. 325. *Kelley v. Boston*, 186 Mass. 165. *Tindley v. Salem*, 187 Mass. 171. *Pratt v. Weymouth*, 147 Mass. 245. *Hafford v. New Bedford*, 16 Gray, 297. And this general principle of exemption from liability extends to negligence of persons employed in carrying out undertakings performed under authority of law in behalf merely of the public health, though of a character for which liability otherwise might be maintained. *Harrington v. Worcester*, 186 Mass. 594. *Benton v. Trustees of Boston City Hospital*, 140 Mass. 13.

It becomes material then to determine what is the character of this work of removing ashes from dwelling houses; and it seems to us to be work of a public nature. It is provided by statute that a town may contract for the disposal of its garbage, refuse and offal. R. L. c. 25, § 14. It is not a strained construction to include ashes under the term "refuse." This word is defined by the Century Dictionary as "that which is refused or rejected; waste or useless matter; the worst or meanest part; rubbish." Ashes have been held to be included within the meaning of this word in England. *Gay v. Cadby*, 2 C. P. D. 391. There is nothing inconsistent with this in the point decided in *St. Martin's v. Gordon*, [1891] 1 Q. B. 61, holding that clinkers produced in the furnaces of a hotel are not refuse of a trade, manufacture or business, although *Gay v. Cadby*, *ubi supra*, is criticised in the opinions. So in *State v. Howard*, 72 Maine, 459, refuse wood was held to include sawdust and shavings. And much of the reasoning of the court in *Vandine, petitioner*, 6 Pick. 187, as to house dirt and offal, is equally applicable to ashes produced in dwelling houses. So in *Commonwealth v. Cutter*, 156 Mass. 52. It is not material that under the statute above cited municipal corporations are simply authorized instead of being required to attend to this work. *Tindley v. Salem*, 187 Mass. 171.

We are of opinion that, unless this case is to be distinguished by reason of the fact that a charge was made for the removal of steam

engine ashes, it must come under the rule that cities and towns are not to be held liable for negligence, in the words of C. Allen, J. in *Tindley v. Salem, ubi supra*, "when, acting under general laws applicable to all cities and towns alike, they have undertaken a particular service or work, which has no direct or natural tendency to injure any individual in person or property, and no element of special corporate advantage as a consideration for undertaking it, or of pecuniary profit or contribution from individuals especially benefited, either by way of aid in the performance of the work or of compensation for its use or benefit after its completion; and where no pecuniary penalty or liability is imposed by statute in case of defective or negligent performance of the undertaking; but where their action is exclusively and purely as a matter of public service, for the general and common good."

Nor do we think that the whole of this service was commercialized because a charge, just enough to cover the expense involved, was made for the removal of steam engine ashes. If this injury had been caused by the negligence of the driver of a cart used for the removal of such ashes, a somewhat different question would arise, as to which we express no opinion. It was said in *Murphy v. Needham*, 176 Mass. 422, 424, 425, that the subject of inquiry was the nature of the duty in which the superintendent who was contended to have been negligent was engaged at the time of the accident; and in this case it appears that at the time of the accident the cart in question was removing only dwelling house ashes. The ordinances of the city are in their terms applicable only to house ashes in contradistinction to steam engine ashes coming from factories or similar sources. Revised Ordinances of 1898, c. 38, § 1; c. 47, § 18. There is nothing to show that steam engine ashes were removed in the same carts, by the same drivers, or at the same times, with house ashes. The latter were taken away as a matter of duty, solely for the public good, under the ordinances above quoted; steam engine ashes seem to have been taken as a matter of contract merely, though doubtless with a view to public convenience. The ordinances made a distinction between these two kinds of ashes; apparently the same distinction was observed in practice. It cannot be said that the same rule of liability would apply to the separate classes which are thus distinguished from each other, or that they can be regarded as so far constituting one subject matter that the taking of compensation for one of them results in the commercialization of both.

Exceptions overruled.

KIPPES v. LOUISVILLE. 167

1910. 140 Ky. 423.

CARROLL, J. The appellant, who was the plaintiff below, averred in a petition filed by her against the appellee to recover damages for personal injuries, that she was injured by the negligence and carelessness of the agents and employees of the city who were at the time engaged in flushing the streets with a hose that was in such an unsafe and defective condition that it burst and threw water upon her, thereby causing her to contract a severe cold that impaired her health.

In the third paragraph of its answer the appellee city alleged that the flusher referred to in the petition, and the other street flushers owned and operated by it, were used for the promotion and preservation of the health of the people of the city, and were necessary for this purpose, as well as for the comfort and safety of the general public. That at the time of the accident complained of the employees of the city, or one of its departments, in charge of the flusher, were engaged in flushing the streets of the city, and that for this service the city did not receive or charge any remuneration or profit, but did the work solely for the promotion of the health, safety, and comfort of the inhabitants of the city and the general public; and that in using the flusher it was exercising a governmental function of the city.

To this paragraph a demurrer was interposed, and overruled, thereupon the plaintiff properly conceiving that the facts set out in this paragraph, if it presented a defense, as the lower court ruled it did, would defeat a recovery, elected to stand by her demurrer, and the petition was dismissed.

It will thus be seen that the only question presented is, whether or not the flushing of the streets of the city was a public duty undertaken by the city in the exercise of its governmental functions, for the benefit of its people and the public generally, or a service performed by the municipality for private or corporate purposes as distinct from its duty to the public generally.

It must be admitted that many of the distinctions that this court, as well as other courts of last resort, have made between what are designated the public and private powers, duties, and liabilities of municipal corporations, are difficult to understand. Nevertheless, the line of demarcation has been drawn with more or less precision, and it is generally ruled that service similar in purpose and effect to that the city was performing when the appellant was injured falls within what are called the public or governmental duties of a city. In fact we have expressly held that sprinkling the streets of a city is essential to the health, comfort, and safety of its inhabitants as well as the public generally, who use its streets. Putting the service the agents of the city, or one of its departments, were performing at the time the plain-

tiff was injured, upon the ground mentioned, the decision of the lower court is supported by a number of opinions delivered by this court as well as the weight of authority in other jurisdictions. *Having v. City of Covington*, 25 Ky. Law Rep. 1617; *Twyman v. Board of Council of the City of Frankfort*, 117 Ky. 518; *Board of Park Commissioners v. Printz*, reported in 127 Ky. 470 (but cited by counsel for appellee as being in 32 Ky. Law Rep. 359); *Maydwell v. City of Louisville*, reported in 116 Ky. 885 (but cited by counsel for appellee as being in 25 R. 1062); *Connolley v. Mayor of City of Nashville*, 100 Tenn. 262.

Wherefore, the judgment of the lower court is affirmed.

HUGHES v. MONROE COUNTY. 168

1895. 147 N. Y. 49.

BARTLETT, J. The plaintiff appeals from an order, made on a motion heard at the General Term in the first instance, granting a new trial after verdict at the Monroe Circuit in her favor.

The plaintiff, an employee at the Monroe County Insane Asylum, was severely injured while operating a machine known as a steam mangle, which was used in the laundry.

At the trial it was insisted on behalf of the defendant that the county of Monroe was not liable in any event; that, assuming its liability, the plaintiff had failed to make out a cause of action.

As we are of opinion that the county of Monroe is not liable under the facts as disclosed in this record, it is unnecessary to determine whether the plaintiff was entitled to go to the jury.

The plaintiff was injured February 11, 1891. Before this action was commenced the County Law of 1892 was in force, but it is unnecessary to examine its provisions, as the *status* of the county of Monroe on the 11th day of February, 1891, must determine its liability.

Prior to the year 1863 the county of Monroe cared in part for its insane in a department of the county poorhouse. By chapter 82, Laws of 1863, it was enacted that the insane asylum of the county of Monroe should be a separate and distinct institution from that of the Monroe county poorhouse, and the board of supervisors were placed in control and authorized to elect a warden, who was to hold office for three years, and a board of three trustees for a like term.

The warden was constituted the chief officer of the asylum, subject to the regulations established by the board of supervisors; all purchases for the asylum were to be made by the warden under the direction of the trustees; all contracts with the attendants and assistants were to be made in the official names of the trustees; the warden was

also required to make out and deliver to the trustees annually an inventory of all property belonging to the asylum; the warden was also authorized to make contracts for the support of insane persons of the county, and by the direction of the board of supervisors or the trustees to demand from the state lunatic asylum all persons who were chargeable to the county of Monroe or to any town or city in the county.

It was further provided that no insane person residing in the county of Monroe and likely to become a county charge should thereafter be admitted to the state lunatic asylum without the written consent of the trustees of the Monroe county asylum or the chairman of the board of supervisors.

By chapter 683, Laws of 1870, it was made the duty of the trustees to determine all questions in relation to the indigent insane as to whether their maintenance was properly a charge upon a specified town within the county of Monroe, or upon the city of Rochester, or upon the county of Monroe; the trustees were also empowered when any lunatic, not indigent, was placed in the asylum, to charge his estate, or the person legally responsible, for his maintenance and to collect the same.

It will thus be observed that the county of Monroe, being legally chargeable as one of the political divisions of the State with the care of its insane, saw fit in 1863, with the consent of the legislature, to undertake the discharge of that duty through the instrumentality of a county asylum.

In other words, the county of Monroe from that time shared with the state the burden of caring for the insane, withdrew from the state lunatic asylum all indigent insane for whose maintenance it was liable and secured legislation requiring all the pauper insane of the county to enter its own asylum.

When an insane person is deprived of his liberty and the custody of his property, placed in close confinement, and separated from family and friends, it is an extreme exercise of the police power by the state, or some political division thereof, for the protection of society and to promote the best interests of the unfortunate victim of mental alienation.

It, therefore, follows that the county of Monroe while acting under the statutes referred to, was engaged in the discharge of a most important public duty and, consequently, not liable to the plaintiff in damages by reason of her injuries. Dillon on Municipal Corporations [4th edition], sec. 693; Addison on Torts [Banks' ed.], p. 1298, section 1526.

In *Maxmilian v. Mayor of New York* (62 N. Y. 160), this court laid down the rules of law that control this case. The plaintiff sought to recover damages for the death of her intestate, who was killed by an ambulance wagon which was driven by an employee of the commissioners of charities and corrections.

It was held that when the city of New York by legislative enact-

ment, was required to elect or appoint an officer to perform a public duty laid not upon it, but upon the officer, in which it had no private interest, and from which it derived no special advantage, such officer is not a servant or agent of the municipality for whose acts it is liable even though the officer had in charge and was negligently using corporate property.

Judge Folger said (page 164): "There are two kinds of duties which are imposed upon municipal corporations; one is of that kind which arises from the grant of a special power in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, under the exercise of which it is as a sovereign. The former power is private and is used for private purposes; the latter is public and is used for public purposes. *Lloyd v. The Mayor*, 5 N. Y. 374. . . . But where the power is intrusted to it as one of the political divisions of the state and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user, nor for misuser by the public agents. *Eastman v. Meredith*, 36 N. H. 284."

In the case at bar, it is true, we are not dealing with a municipal corporation, for in February, 1891, the county of Monroe was a political division of the state, and at most only a quasi corporation; but, nevertheless, the reasoning in the opinion just cited is applicable.

By the act of 1863 the county of Monroe, through its board of supervisors, was required by the legislature to elect a warden and trustees of its insane asylum to perform an important public duty in which it had no private interest, and from which it derived no special advantage. The warden and trustees, when so elected, were in no legal sense the agents of the county of Monroe, but were public officers engaged in the discharge of duties which involved the exercise of the police power, and in which the general public were interested.

While the county of Monroe, by its board of supervisors, was empowered to enact general rules and regulations for the government of the asylum, and to elect its warden and trustees, it had no power to interfere directly with the management of the institution unless the warden so elected was guilty of misconduct, when he could be removed by the board of supervisors.

The non-liability of counties and also of municipal and other corporations having special charters for the acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty, is established by many cases. *Ensign v. Supervisors of Livingston County*, 25 Hun, 20; *Alamango v. Supervisors of Albany County*, 25 id. 551; *Ham v. The Mayor*, 70 N. Y. 459; *Smith v. City of Rochester*, 76 id. 506; *Benton v. Trustees of Boston City Hospital*, 140 Mass. 13; *Curran v. The City of Boston*, 151 id. 505.

The learned counsel for the plaintiff, evidently appreciating the

force of the general rule to which we have adverted, sought to show that the case at bar was, by reason of special facts, not within its operation.

It is insisted that the defendant, at the time of this accident, was not only caring for the pauper insane of Monroe county, but also for other patients through contracts made for that purpose.

Pay for

There is no evidence that the county of Monroe was caring for insane patients not residing in the county, for a consideration, but if such were the case it would be without warrant of law, as we think a fair construction of section seven of chapter 82 of Laws of 1863, limits the contracts to be made "to any individual of said county" who wishes to contract as to the care of the insane of Monroe county.

There can be no doubt that the committee of a lunatic, or any one legally liable to support him, should, in the first instance, be required to pay for his maintenance, and the income derived in this manner is in no sense a source of profit to the county so that it would be deemed in law as conducting a private business.

We may also consider in this connection the suggestion that as the asylum received a small sum annually from the sale of surplus farm products it was to be treated as engaged in a private enterprise resulting in profits.

Sale of farm products

The revenue derived from both of the sources referred to is merely incidental and tends to some little extent to lessen the public burden assumed by the county of Monroe. *Curran v. City of Boston*, 151 Mass. 505, 510; *Atamango v. Board of Supervisors of Albany County*, 25 Hun, 551, 552, 553; *People ex rel. Society of the New York Hospital v. Purdy*, 126 N. Y. 679, and 58 Hun, 386.

We have considered the other suggestions of counsel for appellant contained in his brief and consulted the authorities to which he refers, but find nothing to take this case from the operation of the general rule.

The order of the General Term should be affirmed and under the stipulation of plaintiff judgment absolute ordered for the defendant dismissing the complaint on the merits, with costs to defendant in all the courts.

All concur, except HAIGHT, J., not sitting.

Ordered accordingly.

MELKER v. NEW YORK.

1906. 190 N. Y. 481.

169

VANN, J.¹ This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the fault of the defendant. The complaint contains two counts, one

¹ Arguments omitted. — Ed.

11
 alleging negligence, which was not relied upon at the trial, and the other a nuisance, as the ground of recovery. The action involves the liability of the defendant for an explosion of fireworks on Madison avenue, adjoining Madison square, on the evening of election day, in November, 1902, after the board of aldermen had adopted a resolution suspending the ordinances relating to the discharge of fireworks, "so far as they may apply to the meetings and parades of political parties or associations during the campaign of 1902." The case is a companion to one recently decided by us relating to the same accident. *Landau v. City of New York*, 180 N. Y. 48. Upon the trial of that action it was not disputed that "the National Association of Democratic Clubs, a political organization, had a parade on the evening of November 4th, 1902, and its officers arranged to have a display of fireworks on Madison avenue between Twenty-third and Twenty-fifth streets in connection therewith." Upon the trial of this action the allegation as to a parade by a political organization was disputed and evidence was given by both parties upon the proposition so that it became a question of fact for the jury. In other respects the leading facts were the same in both cases.

Madison avenue, at the point in question, "is a wide street, bounded on the west by Madison square, a park of seven acres, where, as well as in the adjoining streets, 75,000 people assembled to receive the election returns and witness the parade. They stood closely crowded in the park and on both sides of Madison avenue. The fireworks, consisting of mortars, bombs, rockets and the like, were arranged in six parallel rows in the middle and on the west side of the avenue, commencing about twelve feet from the curb. . . . They filled the middle of Madison avenue from Twenty-fourth to Twenty-fifth streets. The bombs were fired from mortars made of steel tubing and were of a kind that had been frequently used before without serious results." Between nine and ten o'clock in the evening some of the fireworks exploded from a cause not disclosed by the evidence and the plaintiff was injured.

Instructions to jury
 11
 The case was submitted to the jury under the instruction that in order to render a verdict for the plaintiff they "must find that there was a meeting or a parade of a political party, or a political association, and that the fireworks were discharged in connection with this parade or meeting, to which no exception was taken. The trial court further charged the jury that they should "determine whether or not the fireworks that were then exposed in the city of New York constituted a nuisance," and that if they were a nuisance the defendant was liable, to which an exception was taken.

The plaintiff requested the court to charge that "fireworks placed upon the surface of a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, and exhibited and discharged there on an extensive scale, as was done in this instance, constitutes a nuisance as matter of law." The court refused to so charge and the plaintiff excepted.

The plaintiff testified that he went to the place in question for the purpose of seeing "the election returns, the balloon and the fireworks," but no instruction was given or requested as to the effect of his presence as a voluntary spectator of the display.

The jury found a verdict for the defendant, and the Appellate Division, after unanimously affirming the judgment entered accordingly, permitted an appeal to this court, and certified that in its opinion "a question of law is involved which ought to be reviewed by the Court of Appeals."

Verdict for A

The rule of unanimous affirmance requires us to assume, for the purpose of this appeal, that the exhibition of fireworks in question was not held in connection with a meeting or parade of a political party or association, and that there was no nuisance as matter of fact. The only question requiring the expression of consideration is whether upon the conceded facts a nuisance existed as matter of law. Twice, quite recently, we have considered the question whether a display of fireworks in a public street in the midst of a large city is a nuisance. *Speir v. City of Brooklyn*, 139 N. Y. 6; *Landau v. City of New York*, 180 N. Y. 48.

In the earlier case the exhibition was held at the junction of two narrow streets in a compact part of the city of Brooklyn, and the damage was caused by fire resulting from the discharge of a rocket directly through a window of the plaintiff's house. Chief Judge ANDREWS, speaking for the court, said: "The finding of the trial judge that the use of the street for the discharge of fireworks constituted a public nuisance is amply justified in view of the circumstances. It has been decided in some cases that the discharge of fireworks in the streets of a city or village is a nuisance per se and subjects persons engaged in the transaction to responsibility for any injury to person or property resulting therefrom. *Jenne v. Sutton*, 43 N. J. L. 257; *Conklin v. Thompson*, 29 Barb. 218. It may be doubted whether the doctrine in its full breadth can be maintained. The practice of making the display of fireworks a part of the entertainment furnished by municipalities on occasions of the celebration of holidays or the commemoration of important public events is almost universal in cities and villages, and we are not prepared to say that this may not be done, and that streets and public places may not be used for this purpose under the supervision of municipal authorities, due care being used both as to the place selected and in the management of the display, without subjecting the municipality to the charge of sanctioning a nuisance and the responsibility of wrongdoers." The final conclusion announced was that the circumstances were such as to authorize the trial court to hold the city liable for an "unreasonable, unwarranted and unlawful use of the streets," and that such use "was properly found to constitute a nuisance." The emphasis of the opinion rests on the location at the junction of two narrow streets and the imminent danger of fire owing to the contracted space and the inflammable nature of the materials used. *Speir v. City of Brooklyn*, 139 N. Y. 6, 11.

The later case involved the display of fireworks now under consideration, where the space was ample, the danger from fire comparatively light, the management in charge of experts of high standing, the accident of unknown origin and of a kind not reasonably to be apprehended. Upon the first trial of that case the plaintiff had a verdict, which was reversed by the Appellate Division. *Landau v. City of New York*, 90 App. Div. 50. Upon the second trial there was a nonsuit and the Appellate Division affirmed, but we reversed and granted a new trial upon the ground, distinctly announced, that "a case was made for the jury." In discussing the subject we said: "There is a distinction, well recognized by law, between the discharge of fireworks upon private property and in a public highway. There is also a distinction in this regard between highways, depending on their location, the extent of the traffic upon them and the danger involved in case of accident. Fireworks in certain streets may or may not be a nuisance, according to the circumstances, which usually present a question of fact. In the case now before us we have to do with a crowded street, near the center of the largest city on the continent, 'where any misadventure in managing the discharge would be likely to result in injury to persons or property.' Fireworks exhibited on an extensive scale in a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as matter of law, may properly be found such as matter of fact. This was so adjudged in the *Speir* case, which is controlling in principle." We held that "while a municipal corporation is not liable for the failure to pass ordinances prohibiting the discharge of fireworks in the public streets, it is bound to exercise due care to keep its streets in safe condition, and is liable for permitting dangerous obstructions or nuisances therein." *Landau v. City of New York*, 180 N. Y. 48.

We intimated that the exhibition might be a nuisance as matter of law, but all we decided was that the nonsuit was improper and that the case should have been sent to the jury. A similar intimation was given in another case, but the actual decision was that there was a question of fact as to the alleged negligence of the defendant. *Crowley v. Rochester Fireworks Co.*, 188 N. Y. 353.

It now becomes our duty to decide whether the exhibition, which resulted in a frightful disaster, was a nuisance as matter of law.

For time out of mind the term "nuisance" has been regarded as incapable of definition so as to fit all cases, because the controlling facts are seldom alike, and each case stands on its own footing. We are not aided by the classification into public and private nuisances, because the difference between them does not depend on the nature of the thing done, but on the fact that one affects the public at large and the other a limited number only. The primary meaning of the word, suggested by its derivation, is that which injures, or, in the quaint phrase of ancient times, "that which worketh hurt." The injury may be to person or property, to health, comfort, safety or morality. It may be a crime. Penal Code, § 385. Courts of high standing have

held that a nuisance at law, or a nuisance *per se*, exists only when the act done is a nuisance at all times and under any circumstances, regardless of location or surroundings. *Hundley v. Harrison*, 123 Ala. 292; *Whitmore v. Orono Pulp & Paper Co.*, 91 Me. 297; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414. Other courts make fitness of locality the standard and give controlling effect to surrounding circumstances, holding certain acts not permissible as matter of law under some circumstances, but permissible under others and under others still not permissible if the jury find them nuisances as matter of fact. The weight of authority in this state and elsewhere is in accordance with the latter view, except when the act is *malum in se*, when the surrounding circumstances have no bearing upon the question.

We think that each case must depend on its own facts for classification as a nuisance at law, or in fact, or neither. Without attempting a general definition we are of the opinion that as applied to the facts of the case before us, if the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as matter of fact; but if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a nuisance as matter of law. While this definition lies on the border of the domain of fact, any definition of a nuisance at law must necessarily lie there, for it is a fact, but so conclusive in legal effect as to be treated as a matter of law. Locality, surroundings, methods, the degree of danger, and the custom of the country are the important factors. The firing of a cannon loaded with grape shot, if in a city or village, would be a nuisance as matter of law; if in a remote place far from the habitations of man, it might be a nuisance as matter of fact, and if against the face of a precipice, no nuisance at all.

What were the surroundings and the degree of danger reasonably to be apprehended from the exhibition in question, when considered, not in the light of what actually took place, but in the light of what was likely to take place? It was not at the junction of two narrow streets, as in the *Speir* case, but in a wide street bordering on a park seven acres in extent, with reasonable space for safe and effective management. The display was under the control of experts of established skill and experience. The fireworks were all made by a leading manufacturer of high repute. For more than thirty years he had given similar displays, with similar pieces, all over the world, without an accident of moment. Repeatedly, in Madison square, in Union square and in City Hall Park, during the Spanish war, on election nights, at the opening of great public works and on other occasions, he had given such exhibitions with no bad results. He had never known a mortar to explode before and it was the explosion of a mortar used for the purpose of firing bombs that caused the accident. All the mortars had been carefully tested on the day of the exhibition and each responded to the tap of the hammer with that clear ring which indicates a sound condition. The explosion was owing to some cause so secret

and unprecedented that it could not be explained. Army officers of great experience in testing explosives made many experiments with similar mortars soon after the accident, at the request of the district attorney, but they could not state the cause of the explosion and they regarded the mortars as safe. The expert called by the plaintiff, an ex-army officer who had made many tests in behalf of the government, likened the occurrence to the firing of a gun hundreds of times without danger, when at last "you suddenly have a burst that cannot be explained." He looked for the unexpected and favored precautions to meet what possibly might happen. He thought that "as an extra precaution" space should have been "roped off for one hundred feet" and that the mortars should have been sunk below the surface of the ground so that a possible explosion would do no damage. The other experts were of a different opinion, and some thought that burying in the ground would increase the danger.

The occasion was one of public rejoicing by many people. For generations such exhibitions have been common throughout the country. Our great national holiday never passes without them in many places all over the land. National victories, the victories of political parties and the success of organizations comprising a multitude of persons, for time out of mind have been celebrated by such displays. It is a common method by which large bodies of people express their satisfaction and joy over some event they deem important. Fireworks are widely used to express patriotism, triumph and gladness, to celebrate public events, to entertain crowds of people and for various purposes, too numerous to mention. Such uses are no innovation but are in accordance with an old and well-settled custom of the country, sanctioned by the practice of every community. The custom may not be wise, but it is almost universal and indicates the average judgment of our citizens upon the subject.

An exhibition of fireworks is not *malum in se*, but is evil or innocent according to circumstances. Unless *malum in se*, like a disorderly house, for instance, a nuisance is a matter of degree. Thus we have held that the storage of gunpowder is not a nuisance *per se* and that it "depends upon the locality, the quantity and the surrounding circumstances," which are for the consideration of the jury. *Heeg v. Licht*, 80 N. Y. 579. A nuisance does not rest upon the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care. Degree implies gradation, and gradation depends on circumstances. When the degree of danger is obvious and so extreme as to invite calamity, a nuisance *per se* exists, but when the danger is so secret in nature that the cause of an accident cannot be discovered and according to all experience is neither imminent nor extreme, it is not a nuisance *per se*, although the jury may find it a nuisance in fact. When disinterested army officers, expert from years of official experiments, testify that the degree of danger was so slight that they regarded the mortars as safe

and the only difference of opinion related to the method of using them, it would be hazardous to hold the danger so inherent and the degree of danger so extreme as to make the act a nuisance of itself, independent of the attending circumstances. If the circumstances are to be considered, they must be weighed in order to get at the degree of danger and the weight of evidence is for the judges of fact. The circumstances of this case do not call for the hard and fast rule of a nuisance as matter of law, but for the judgment of a jury whether the occurrence was a nuisance as matter of fact. The terrible but unprecedented result may suggest regulation or restraint by the legislature, but it is safer for the courts, following the weight of authority throughout the country, to leave such questions to a jury, even at the risk of inconsistent verdicts, rather than to lay down a rigid and inflexible rule, less calculated to do justice in a majority of cases.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, WERNER, HISCOCK and CHASE, JJ., concur; EDWARD T. BARTLETT, J., absent.

Judgment affirmed.

c. NEGLIGENCE IN PERFORMANCE OF A MUNICIPAL FUNCTION.

MOWER v. INHABITANTS OF LEICESTER. 170 9 cases.

1812. 9 Massachusetts, 237.¹

Action at common law, to recover for damages sustained through the defect of a highway in the town of Leicester. Verdict for plaintiff. Motion in arrest of judgment.

Blake and Lincoln, for plaintiff.

An injury arising from the neglect of a duty enjoined by law, whether on an individual or a corporation, is a good foundation for an action at common law. Towns are by statute enjoined to maintain in good repair all highways within their respective limits: and in case of their neglect of their duty in this regard, and a special injury happening to an individual in consequence thereof, they are made liable to double the damages sustained thereby, after reasonable notice. Statute of 1786, ch. 81, sects. 1 and 7 . . . an action at common law, for the recovery of single damages only, will well lie for such an injury. . . .

None of the objections, which prevailed in the action of *Russell & al. vs. The men of Devon*, apply in this case. Here the town are a corporation created by statute, capable of suing and being sued. They are bound by statute to keep the publick highways in repair. They have a treasury, out of which judgments recovered against them may

¹ Statement abridged. — Ed.

be satisfied. They are called upon to answer only for their own default. The objection, that a multiplicity of actions would be the consequence of levying the execution on one or more individuals of the town, can have no effect here; since it would equally apply to every action against a town or parish: and yet such actions are every day brought and supported without hearing of this objection. Besides, individuals so situated have their remedy over against the corporation for the sum paid by them; and are not put to their action against each inhabitant for his several proportion, as the case referred to supposes in the case of an English county.

Bigelow, for defendants. [Argument omitted.]

CURIA. The plaintiff has brought his action against the inhabitants of the town of *Leicester*, for the loss of his horse, occasioned by the neglect of that town to keep a certain bridge in repair. The action is at common law; without alleging any notice to the inhabitants of the defect in the bridge, previously to the incurring of the damage by the plaintiff. — But it is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But *quasi* corporations, created by the legislature for purposes of public policy, are subject by the common law, to an indictment for the neglect of duties enjoined on them: but are not liable to an action for such neglect, unless the action be given by some statute. The only action furnished by statute in this case is for double damages after notice, &c. — This question is fully discussed in the case of *Russell & al. vs. The men of Devon*, cited at the bar, and the reasoning there is conclusive against the action.

*Judgment arrested.*¹

¹ "In considering the subject of *the implied liability* (by which we mean a liability where there is no express statute creating or declaring it) of municipal corporations to civil actions for misconduct or neglect on their part, or on the part of their officers in respect to corporate duties, resulting in injuries to individuals, it is essential to bear in mind the distinction pointed out in a former chapter, and to be noticed again hereafter, between *municipal corporations* proper, such as towns and cities specially chartered or voluntarily organizing under general acts, and *involuntary quasi corporations*, such as townships, school districts, and counties (as these several organizations exist in most of the States), including therein for this purpose the peculiar form of organization before referred to, known as the New England town. The decisions of the courts in this country are almost uniform in holding the former class of corporations to a much more extended liability than the latter, even where the latter are invested with corporate capacity and with the power of taxation; but respecting the *grounds* for this difference, there is considerable diversity of opinion." 2 Dillon Mun. Corp., 4th ed., s. 961. — Ed.

CITY OF DETROIT v. BLACKEBY. 171

1870. 21 Michigan, 84.¹

ACTION against the city of Detroit for an injury occasioned by defects in a cross walk across a public street.

[There was no statute giving, in terms, an action against the city for damage occasioned by defects in streets; but the city was incorporated by special charter, and had, under the charter, the sole control of its streets and highways, with power to keep them in repair.]

In the Circuit Court the decision was for the plaintiff; and the city brought error.

J. P. Whittemore, for plaintiffs in error.

Geo. H. Prentiss, and *Theo. Romeyn*, for defendants in error.

CAMPBELL, C. J. . . . The streets of Detroit are public highways, designed like all other roads, for the benefit of all people desiring to travel upon them. The duty or power of keeping them in proper condition is a public and not a private duty, and it is an office for the performance of which there is no compensation given to the city. Whatever liability exists to perform this service to the public, and to respond for any failure to perform it, must arise, if at all, from the implication that is claimed to exist in the nature of such a municipality.

There is a vague impression that municipalities are bound in all cases to answer in damages for all private injuries from defects in the public ways. But the law in this State, and in most parts of the country, rejects this as a general proposition, and confines the recovery to causes of grievance arising under peculiar circumstances. If there is any ground for recovery here, it is because Detroit is incorporated. And it depends therefore on the consideration whether there is anything in the nature of incorporated municipalities like this which should subject them to liabilities not enforced against towns or counties. The cases which recognize the distinction apply it to villages and cities alike.

It has never been claimed that the violation of duty to the public was any more reprehensible in these corporations than outside of them; nor that there was any more justice in giving damages for an injury sustained in a city or village street than for one sustained outside of the corporate bounds. The private suffering is the same, and the official negligence may be the same. The reason, if it exists, is to be found in some other direction, and can only be tried by a comparison of some of the classes of authorities which have dealt with the subject in hand.

It has been held that corporations may be liable to suit for positive mischief produced by their active misconduct, and not from mere errors of judgment. . . . *Thayer v. The City of Boston*, 19 Pick., 511, was a case of this kind, involving a direct encroachment on private prop-

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not liable.*

¹ Statement abridged. Arguments omitted. — Ed.

erty. . . . *Lee v. Village of Sandy Hill*, 40 N. Y., 442, involved a direct trespass.

The injuries involved in these New York and Massachusetts cases referred to were not the result of public nuisances, but were purely private grievances. And in several cases cited on the argument, the mischiefs complained of were altogether private. The distinction between these and public nuisances or neglects has not always been observed, and has led to some of the confusion which is found in the authorities. In all the cases involving injuries from obstructions to drainage, the grievance was a private nuisance. [After referring to authorities.] Upon any theory which sustains the liability for such grievances, however, it is manifest that the injury is not a public grievance in any sense, and does not involve a special private damage from an act that at the same time affects injuriously the whole people.

Another class of injuries involves a public grievance specially injuring an individual, arising out of some neglect or misconduct in the management of some of those works which are held in New York to concern the municipality in its private interests, and to be in law the same as private enterprises.

The cases in which cities and villages have been held subject to suits for neglect of public duty, in not keeping highways in repair, where none of the other elements have been taken into the account, are not numerous, and all which quote any authority profess to rest especially upon the New York cases, except where the remedy is statutory.

[After citing various New York cases.]

But the case of *Weet v. Brockport*, 16 N. Y., 161, is recognized as the one in which the whole law has been finally settled, and it is upon the grounds there laid down, that the liability is now fixed in New York. The elaborate opinion of Judge Selden, which was adopted by the Court of Appeals, denies the correctness of the *dicta* in some of the previous cases, and asserts the liability to an action solely upon the ground that the franchises granted to municipal corporations are in law a sufficient consideration for an implied promise to perform with fidelity all the duties imposed by the charter;—and that the liability is the same as that which attaches against individuals who have franchises in ferries, toll-bridges, and the like. The principle, as he states it, is:—“That whenever an individual, or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases, the contract made with the sovereign power is deemed to enure to the benefit of every individual interested in its performance.”

In order to get at the true ground of liability, the opinion goes on to

determine, *first*, whether townships and other public bodies, not being incorporated cities or villages, are liable, and shows conclusively that they are not. And the Court arrive at this conclusion, not on the basis of an absence of duty or an absence of means, but because their duties are duties to the public, and not to individuals. To show this, full citations are made from the English cases, which were cited before us, and also from the American cases.

It is admitted everywhere, except in a single case in Maryland, that here is no common-law liability against ordinary municipal corporations such as towns and counties, and that they cannot be sued except by statute.

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not liable*

It has also been uniformly held in New York, as well as elsewhere, that public officers, whose offices are created by act of the Legislature, are in no sense municipal agents, and that their neglect is not to be regarded as the neglect of the municipality, and their misconduct is not chargeable against it unless it is authorized or ratified expressly or by implication. This doctrine has been applied to cities as well as to all other corporations.

And the numerous cases which exonerate cities from liability for not enforcing their police laws, so as to prevent damage, rest upon a very similar basis.

In the case of *Eastman v. Meredith*, 36 N. H., 284, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature, which they have received upon conditions, and which they can hold by the same indefeasible right with individuals. But American municipalities hold their functions merely as governing agencies. They may own private property, and transact business not strictly municipal, if allowed by law to do so, just as private parties may, and with the same liability. But their public functions are all held at sufferance, and their duties may be multiplied and enforced at the pleasure of the Legislature. They have no choice in the matter. They have no privileges which cannot be taken away, and they derive no profit from their care of the public ways, and the execution of their public functions. They differ from towns only in the extent of their powers and duties bestowed for public purposes, and their improvements are made by taxation, just as they are made on a smaller scale in towns and counties.

... Because streets are not private, and because, in this State, at least, no municipality can exercise any powers except by State permission, and every municipal charter is liable to be amended at pleasure. The charter of Detroit has undergone the most radical changes.

It is impossible to sustain the proposition that these charters rest in contract. And it is impossible, — as Judge Selden demonstrates, to find

legal warrant for any other ground for distinguishing the liability of one municipal body from that of another. There is no basis in authority for any such distinction concerning the consideration on which their powers are granted, and it rests upon simple assertion.

It is impossible to harmonize the decision [of the New York Court] with the previous decisions exempting corporations from responsibility because public officers were not their agents. It is no easier to sustain it in the face of the uniform decisions denying liability for failure to enforce their police regulations. The authorities which make corporations liable on the ground of conditions attached to their franchises, go very far towards compelling them to respond as absolutely bound to prevent mischief. And the general reasoning on which the most of the opinion rests, and the criticisms made upon former decisions, — which, it is asserted, went altogether too far in creating liability, — all are designed to show, and do show, very forcibly that simply as municipal corporations, — apart from any contract theory, — no public bodies can be made responsible for official neglect involving no active misfeasance.

There is no such distinction recognized in the law elsewhere. In *City of Providence v. Clapp*, 17 How. R., 161, the United States Supreme Court, through Judge Nelson, held that cities and towns were alike in their responsibility and in their immunity. In *County Commissioners of Anne Arundel v. Duckett*, 20 Md., 468, a county was held responsible to the fullest extent. In New Jersey, in *Freeholders of Sussex v. Strader*, 3 Harr. (18 N. J.), 108; *Cooley v. Freeholders of Essex*, 27 N. J., 415; *Livermore v. Freeholders of Camden*, 29 N. J., 245, and *2 Vroom* (31 N. J.), 507; and *Pray v. Mayor of Jersey City*, 32 N. J., 394, the cases were all rested on the same principles, and cities were exonerated because towns and counties were. The suggestion of Judge Selden has been caught at by some courts since the decision, and has been carried to its legitimate results, as in *Jones v. New Haven*, 34 Conn., 1, where the damage was caused by a falling limb of a tree. But, so far as we have seen, even the cases which are decided on this ground, do not hold that towns do not receive their powers upon a consideration as well as cities. That question still remains to be handled in those courts.

It is utterly impossible to draw any rational distinction on any such ground. It is competent for the Legislature to give towns and counties powers as large as those granted to cities. Each receives what is supposed to be necessary or convenient, and each receives this because the good government of the people is supposed to require it. It would be contrary to every principle of fairness to give special privileges to any part of the people and deny them to others; and such is not the purpose of city charters. In England the burgesses of boroughs and cities had very important and valuable privileges of an exclusive nature, and not common to all the people of the realm. The charters were grants of privilege and not mere government agencies. Their free customs

and liberties were put by the great charter under the same immunity with private freeholds. But in this State, and in this country generally, they are not placed beyond legislative control. The Dartmouth College case, which first established charters as contracts, distinguished between public and private corporations, and there is no respectable authority to be found anywhere, which holds that either offices or municipal charters generally involve any rights of property whatever. They are all created for public uses and subject to public control.

We think that it will require legislative action to create any liability to private suit for non-repair of public ways. Whether such responsibility should be created, and to what extent and under what circumstances it should be enforced, are legislative questions of importance and some nicety. They cannot be solved by courts.

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Judgment should be reversed with costs.

CHRISTIANCY and GRAVES, JJ. concurred.

COOLEY, J. dissenting.

It is unquestionably, I think, a rule of sound public policy, that a municipal corporation which is vested with full control of the public streets within its limits, and chargeable with the duty of keeping them in repair, and which also possesses by law the means of repair, should be held liable to an individual who has suffered injury by a failure to perform this duty. If we sat here as legislators to determine what the law ought to be, I think we should have no difficulty in coming to this conclusion.

City sh be liable

But we sit here in a judicial capacity, and the question presented is, what is the law, and not what ought the law to be. This question is to be determined upon common-law principles, and the most satisfactory evidence of what those principles are is to be found in the decisions of the courts.

The decisions which are in point are numerous; they have been made in many different jurisdictions, and by many able jurists, — and there has been a general concurrence in declaring the law to be in fact what we have already said in point of sound policy it ought to be. We are asked, nevertheless, to disregard these decisions, and to establish for this State a rule of law different from that which prevails elsewhere, and different from that which, I think, has been understood and accepted as sound law in this State prior to the present litigation.

The reason pressed upon us for such a decision is, not that the decisions referred to are vicious in their results, but that the reasons assigned for them are insufficient, so that, logically, the courts ought to have come to a different conclusion.

I doubt if it is a sufficient reason for overturning an established doctrine in the law, when its results are not mischievous, that strict logical reasoning should have led the courts to a different conclusion in the beginning; if it is, we may be called upon to examine the foundation of many rules of the common law which have always passed unquestioned.

I concur fully in the doctrine that a municipal corporation or body is not liable to an individual damnified by the exercise, or the failure to exercise, a legislative authority; and I also agree that the political divisions of the State, which have duties imposed upon them by general law without their assent, are not liable to respond to individuals in damages for their neglect, unless expressly made so by statute. Upon these two points the authorities are generally agreed, and the result is well stated in the opinion of the Chief Justice.

The question for us to decide is, whether a different rule applies where a municipal corporation exists under a special charter which confers peculiar powers and privileges, and imposes special duties, from that which prevails in the case of towns and counties. The authorities have found reason for a distinction, and I am not yet prepared to say that their reason is baseless.

The leading case on the subject is *Henley v. The Mayor and Burgesses of Lyme Regis*, which went from the Common Pleas through the King's Bench to the House of Lords, and is reported in 5 *Bing.*, 91; 3 *Barn. and Ad.*, 77, and 1 *Bing. N. C.*, 222. In that case it appeared that the King, by letters patent, had granted to the Mayor and Burgesses of Lyme Regis the borough or town of that name, and also the pier, quay, or cob, with all liberties, profits, etc., belonging to the same, and remitted a part of their ancient rent, expressing his will therein, that the said Mayor and Burgesses and their successors, all and singular, the buildings, banks, sea-shores, etc., within the said borough, or thereunto belonging, or situate between the same and the sea, and also the said pier, etc., at their own costs and charges, should repair, maintain and support. All the courts held that the defendants, having accepted the charter, became legally bound to repair the buildings, banks, etc., and that as this obligation was one which concerned the public, an action on the case would lie against them for a direct and particular damage sustained by an individual in consequence of a neglect to perform it. The reasoning was, that the things granted by the charter were the consideration for the repairs to be made; and that the corporation, by accepting the letters patent, bound themselves to do these repairs. This decision is the unquestioned law of England to the present time, and is referred to with approbation in the American cases.

I do not understand this decision or the previous and analogous one of *Mayor of Lynn v. Turner, Corp.*, 86, to be questioned in the present case; but it is contended that neither is applicable, because the grant was one for the benefit of the corporators, which they might accept or refuse at their option, but which, if accepted, must be taken *cum onere*, and the acceptance was in the nature of a covenant to perform the duty imposed. Moreover, that duty, it is said, was individual, not governmental; and the responsibility for failure to perform it would not depend on negligence, notice, or any other contingency not expressed in the covenant; and in any point of view it is argued that these deci-

sions have no more bearing upon the question of public duties and public responsibilities, than if the grants to the corporations in these cases had been made to individual residents.

This is not the first time that this view of the cases referred to has been presented to the courts. It was very fully examined by Mr. Justice Selden in *Weet v. Brockport*, 16 N. Y., 161, note, and in his opinion there was nothing in it which should exempt municipal corporations from the principle declared, even when the neglect of duty relates to a governmental power. "It is well known," he very truly says, that "charters are never imposed upon municipal bodies except at their urgent request. While they may be governmental measures in theory, they are, in fact, regarded as privileges of great value, and the franchises they confer are usually sought for with much earnestness before they are granted. The surrender by the Government to the municipality of a portion of the sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking on the part of the corporation, to perform with fidelity the duties which the charter imposes." *Ibid.*, 171.

Now it does not appear to me to be a sufficient answer to this position, that the State *might*, if it saw fit, impose a municipal charter upon the people without their consent and even against their remonstrance. That is not the ordinary course of events, and the question for us to consider is — What is the legal significance of things as they actually occur? We find, as matter of fact, that people apply for a charter conferring such privileges as they deem important, in view of their actual circumstances, and that many of these privileges are quite superior to, and more valuable than, those possessed by the people generally. When the Legislature grants these privileges it imposes concurrent duties. What is the fair construction of these acts of the people and the Legislature respectively, — the people in soliciting the privileges, and the Legislature in attaching the duties to the grant which it makes? This is the question which we are to consider.

The New York courts have invariably held that when the people of the municipality accepted the charter which they had thus solicited, a contract was implied on their part to perform the corporate duties.

They have always denied that in this respect there was any difference between a municipal corporation and a private corporation or private individual, who had received from the sovereignty a valuable grant, charged with conditions. — *Hutson v. N. Y.*, 9 N. Y., 163; *Weet v. Brockport*, 16 N. Y., note, 161; *Conrad v. Ithaca*, 16 N. Y., 158; *Storrs v. Utica*, 17 N. Y., 104; *Mills v. Brooklyn*, 32 N. Y., 489; *Lee v. Sandy Hill*, 40 N. Y., 442. The same decision has frequently been made in other States. *Meares v. Wilmington*, 9 Ired., 73; *Pittsburgh v. Grier*, 22 Penn. St., 63; *Erie v. Schwingle*, *Ibid.*, 388; *Ross v. Madison*, 1 Ind., 281; *Stackhouse v. LaFayette*, 26 Ind., 17; *Smoot v. Wetumpka*, 24 Ala., 112; *Browning v. Springfield*, 17 Ill., 143, in which the question is very fully and carefully considered by Mr. Chief

Justice Scates. *Commissioners v. Duckett*, 20 Md., 468; *Sawyer v. Corse*, 17 Grat., 241; *Richmond v. Long*, *Ibid.*, 375; *Bigelow v. Randolph*, 14 Gray, 541, which, though not an express authority, recognizes the doctrine: *Jones v. New Haven*, 32 Conn., 1; *Cook v. Milwaukee*, recently decided by the Supreme Court of Wisconsin, and to be found in 9 *Law Reg. N. S.* 263 [24 Wis., 270].

The same question has also been frequently and fully examined by the Supreme Court of the United States, and no doctrine is more firmly settled in that Court than that municipal corporations are liable for negligence in cases like the present. It will be sufficient, perhaps, to refer to the case of *Weightman v. Washington*, 1 Black, 39, in which the English and American cases were examined, but the same question has frequently been brought to the attention of the Court since, and uniformly with the same result.

And it is remarkable that in all the cases which have upheld this doctrine there has scarcely been a whisper of judicial dissent. It would be difficult to mention another so important question, which has been so often, so carefully, and so dispassionately examined, and with such uniform result. In no State is the doctrine of *Henley v. Mayor, etc., of Lyme Regis*, as applied in *Weet v. Brockport*, denied except in New Jersey, and in that State the authorities I have referred to seem to have been passed over in silence and perhaps were not observed.

We are asked, therefore, to overrule a rule of law which is safe, useful and politic in its operation, and which has been generally accepted throughout the Union, not through inadvertence or by surprise, but after careful, patient and repeated examination upon principle, by many able jurists, who have successively given due consideration to the fallacies supposed to underlie it. For my own part I must say that the fallacies are not clearly apparent to my mind, and I therefore prefer to stand with the authorities. And I deem it proper to add also, that, inasmuch as the rule of responsibility in question seems to me a just and proper one, I should be inclined, if my judgment of its logical soundness were otherwise, to defer to the previous decisions, and leave the Legislature to alter the rule if they should see fit.¹

¹ [As to civil liability for damages from defective streets.]

"The cases may be grouped into the following classes:—

"*First.* Where neither chartered cities nor counties or other *quasi* corporations are held to an implied civil liability. Only a few States have adopted this extreme view of exempting cities from liability in this respect.

"*Second.* Where the reverse is held, and both chartered cities and counties are alike considered to be impliedly liable for their neglect of the duty in question. This doctrine prevails in a small number of States.

"*Third.* Where municipal corporations proper, such as chartered cities, are held to an implied civil liability for damages caused to travellers of a defective and unsafe streets under their control, but denying that such a liability attaches to counties or other *quasi* corporations as respects highways and bridges under their charge. This distinction has received judicial sanction in a large majority of the States, where the legislation is silent in respect of corporate liability." 2 Dillon, *Mun. Corp.*, 4th ed. § 999.—Ed.

BARTON v. CITY OF SYRACUSE. 172

1867. 36 New York, 54.

BOCKES, J. This is an action on the case for negligence, in which the defendant is charged with culpability in omitting to keep a sewer in proper repair, and in suffering it to become filled with dirt and rubbish, by reason of which the flow of the water was impeded, causing it to set back through the plaintiff's drain into his cellar, to the injury of his property.

*Not a case of
trespass*

The referee, to whom the case was referred to hear and determine, directed judgment for the plaintiff, which judgment was affirmed at General Term.

By the city charter, the mayor and common council were authorized and directed to construct sewers through the city, and to keep them in repair. They accepted and entered upon the performance of this duty, and constructed sewers along such of the streets as were deemed appropriate, with a view to favorable and healthful drainage. The expenses were assessed upon the property benefited, as provided by the charter, and their supervision and control were properly assumed by the city government. Under this condition of authority and duty, the municipal corporation were bound, through the proper officers, to a faithful and prudent exercise of power, and carelessness and negligence in that regard created a liability, which might be enforced by any one suffering damages therefrom. So the law is firmly established, that in constructing sewers, and in keeping them in repair, a municipal corporation acts ministerially, and, having the authority to do the act, is bound to the exercise of needful prudence, watchfulness and care. The authorities in support of these principles are too numerous and familiar to require particular comment.

[Remainder of opinion omitted.]

Judgment affirmed

O'DONNELL v. SYRACUSE. 173

1906. 184 N. Y. 1.

GRAY, J.¹ The theory of the defendant's responsibility, maintained by the learned referee in an opinion, was that, by practically taking possession of Onondaga creek for its municipal purpose, it had "converted a natural watercourse into a public sewer" and its duty was "the same as if the sewer was originally artificial." Hence, it was "bound

¹ Arguments omitted. — Ed.

to maintain it in a reasonably safe and efficient condition," and having failed to perform this duty, the failure was an efficient cause of the injury to the plaintiff's property. At the Appellate Division, this theory of liability was concurred in. It was thought that, from the use made of the creek, "the city was called upon to exercise, affirmatively, its governmental functions to reduce to a minimum the damages likely to result from the use" and that "the affirmative obligation, inseparably linked with this user, throws upon it the burden of paying whatever damages resulted from the overflowage, although the unusual flood was the inducing cause and responsible for the greater proportion of the damages." I am unable to agree with the courts below in this view of the city's responsibility towards its inhabitants. I might suggest that, as it was found that the city's acts but contributed "to some extent" to the overflow of the creek, it was error to hold it liable for a damage to the plaintiff, to which the acts of others, not acting in concert with it, had contributed. The channel of the creek had been obstructed by the throwing in of ashes, cinders, dirt and rubbish from its banks and by the formation of bars of sand and gravel; so that others than the city were, measurably, responsible for interfering with the channel of the stream. The municipality was chargeable only with that much of the damage which was caused by its wrongful acts; and if the damage was incapable of separation and the proportions of liability could not be established, that fact affords no reason for holding the city responsible for the tortious acts of others. The rule is discussed in *Chipman v. Palmer*, (77 N. Y. 51), in the light of both the American and the English cases and is summarized in the statement that "where different parties are engaged in polluting, or obstructing, a stream, at different times and different places, the whole damages occasioned by such wrongful acts cannot be collected of one of the parties." See, also, *Sammons v. City of Gloversville*, 175 N. Y. 346. I think the rule is applicable to this case; but I prefer to place its decision upon a broader ground and to hold that no responsibility whatever lay upon the city for what damage the plaintiff, or others, similarly situated, may have sustained by reason of the extraordinary rise and overflow of the creek.

It will not, I assume, be disputed that a municipality would not be liable for the consequences of a mere overflow of the stream, or river, upon whose banks the settlement had been made and had grown into the proportions of a city, in the absence, of course, of any conditions enjoining some duty with respect thereto, through the neglect of which injury had been occasioned. Indeed, it was conceded below that no duty, ordinarily, would be cast upon a municipality to restrain the waters between the banks and, hence, none to indemnify its citizens against the consequences of freshets, or floods. But the argument is that the city, by its user of Onondaga creek, under its charter and ordinances, and under certain statutes, came under a responsibility for its safe condition. That is to say, that it had assumed a dominion over

the stream by converting it to its use for sewer purposes and was, therefore, under an "affirmative obligation, inseparably linked with the user," of paying the damages resulting from an overflow. This is a broad proposition and, as I think, an unwarrantable extension of the rule of municipal liability. In order that a municipality shall be made liable for causing an injury, it must appear that some duty, incumbent upon it to perform, had been neglected, or had been improperly discharged. The act, the omission, or commission, of which is charged as the cause of the injury, must have been within the scope of the corporate powers, as provided by the charter, or by some positive enactment of law. A municipal corporation is the delegate of sovereign power to legislate as to the public needs of a locality. It may be said, in a sense, to possess a dual character. It acts in a governmental capacity, to the extent that it exercises its powers in matters of public concern, and it acts in a private capacity, in so far as it exercises its powers, under its by-laws, for private advantage, in matters pertaining to the municipality, as the proprietor of the various works and properties. *Lloyd v. Mayor, etc., of N. Y.*, 5 N. Y. 369. It exercises the governmental powers delegated by the state over the particular political subdivision thereof and it cannot be held liable for the non-exercise of, or for the manner in which it exercises, those discretionary powers, which are classed as of a public, or legislative, character. But where the duty is a corporate one, having relation to its special interests, and it is absolute and perfect, and not discretionary in its nature, in the performance of which the plaintiff has an interest, his action will lie against the municipality for the damages occasioned by a failure to perform. In other words, if the duty be judicial in its nature, as calling for the exercise of judgment, no liability rests upon the municipality for non-performance; whereas, if it be of a ministerial nature, neglect to perform it will render the municipality responsible to one injured thereby. See *Dillon on Municipal Corporations*, §§ 753, 778; *Griffin v. Mayor, etc., of N. Y.*, 9 N. Y. 456; *Lloyd v. Mayor, etc., of N. Y.*, *supra*. It is a principle of municipal responsibility, early accepted from the common law, in this state, that in the acceptance of a charter sufficient consideration is found in the grant of powers and franchises to support an implied undertaking to perform what duties are imposed, which will enure to the benefit of every individual interested in their performance. *Weet v. Trustees of Village of Brockport*, 16 N. Y. 161, note; *Cain v. City of Syracuse*, 95 ib. 83. But, in the application of the principle, the distinction is to be borne constantly in mind that a corporate duty is not always absolute. For instance, if it relate to legislation in the public interest, or to the undertaking of some work of a public nature, which it has not been commanded to do by the state, however comprehensive of the matter the powers conferred by charter, or by positive legislative enactments, may be, the duty is, necessarily, discretionary, because within the exercise of a deliberate judgment. Nor does it follow that, although there may be an admitted corporate

control of the subject, an absolute and imperative duty arises. *Caia v. City of Syracuse, supra.*

I think we may, at once, dismiss from our minds any consideration of the argument that, because Onondaga creek had been declared a public highway by statute, a peculiar duty had devolved upon the city in consequence, pertinent to this case. The ordinary rule of municipal obligation, with respect to the care and maintenance of highways, under the statute, does not apply and no duty, ordinarily, rests upon the municipality, through whose boundaries a river or stream passes, in whole or in part, to keep it in a safe condition, or free from obstructions not of its own causing. *Seaman v. Mayor, etc., of N. Y.*, 80 N. Y. 289; *Coonley v. City of Albany*, 132 ib. 145.

In the discussion of this case, I accept its facts, as they are established by the findings of the trial court; and I find the theory of the plaintiff's recovery to be contained, substantially, in this proposition: that a peculiar responsibility rested upon the city of Syracuse, by reason of an assumption of corporate dominion over the creek, in using it as a part of its sewerage system, under provisions of its charter and of special legislative enactments; and that the neglect to exercise, or the imperfect exercise of, the power effectively to protect the inhabitants against an overflow of the stream made the city liable in damages to any one injured thereby. The liability of the city was predicated upon the notion of its negligence in the performance of municipal duties incumbent upon it, with respect to the maintenance of the channel of the creek. No negligence is found, nor appears, so far as mere construction of sewers, or of bridges, is concerned. It was the effect of the former, as increasing the flow of the stream, that is made to support the charge of negligence in not providing for the adequate carriage of the waters from freshets and floods. As to the bridges, their construction was authorized, and it was an unquestionable duty of the municipality, whose territory the stream separated, to construct them as connections and portions of the streets, or highways. No liability was thereby cast upon the city for any consequential damages, which may be claimed to have been occasioned through their having impeded the flow of the stream. *Radcliff's Exrs. v. Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Atwater v. Trustees of Village of Canandaigua*, 124 ib. 602.

I consider that we must find support for this judgment, solely, in some duty cast by the statute upon the municipality and negligently performed, or omitted. I find no evidence of a corporate dominion or control assumed, other than in the use made of the creek, as an outlet for its system of sewers; and it is necessary briefly to notice, in the light of the legal principles to which I have above called attention, the powers conferred upon the corporate authorities in the charter legislation, or in the special acts, to which our attention has been directed. The city of Syracuse was incorporated in 1847. Onondaga creek, rising in the highlands to the south of the city, flows through it to the north; draining the extensive watershed of the country beyond the city

and furnishing a natural drainage for municipal needs. The original charter provisions gave authority to the common council to make highways, bridges, sewers, etc., and imposed duties with respect to their proper maintenance and repair. In 1854, (Chap. 28 of the laws), the legislature, revising the charter, gave power to the common council to pass ordinances and to make regulations, providing, among other things, for the construction and the repair of sewers; for the regulation, straightening and improvement of the channel of Onondaga creek and for the draining of the lands adjacent thereto; for the prevention of encroachments upon the channel and for the deepening of the same. In subsequent charters, as amended, revised, or affected by legislation, ample powers were conferred upon the municipal government, with respect to the making, maintenance, or improvement, of sewers, and to the regulating, deepening and improving of Onondaga creek. In 1854 and 1855, (Chaps. 86 and 508 of the laws), special commissions were appointed by the legislature for the purpose of straightening the creek and of making a new and artificial channel; and to some extent this work was done. By subsequent acts, commissions were appointed and powers were conferred upon the municipal authorities to establish a system of sewerage. In 1898, (§ 151 of chap. 595 of the laws), the legislature provided that "all sewers . . . shall conform in all things to the system of sewerage set forth in the report and shown by the maps made by Samuel M. Gray," etc., with power to "the common council in their discretion to make any necessary change in said system," etc. It also appears that the attention of the common council had been called, by one of their committees, to the necessity of some action to avert danger from the recurrence of possible floods, by improving the channel.

We may assume, therefore, that there were lacking neither authority, nor power, in the municipal government to take any measures, relating to the improvement of Onondaga creek, nor advisory statements as to the necessity for such measures. But, clearly, all such measures were discretionary with, and lay in the judicial action of, the authorities. As to the sewers, the situation was different. Their construction, so far as it had been assumed, devolved a duty upon the municipality for their maintenance, in a proper manner and free from obstructions, which was of a purely ministerial nature; for it was a corporate obligation having relation to its special interests. *Rochester W. L. Co. v. City of Rochester*, 3 N. Y. 463. The Gray system, provided for by the act of 1898, intended an operation of the sewers, which would prevent pollution of the waters of the creek, and it made no provision for floods; however it may be argued that the effect would, probably, have been to protect against them. No absolute duty appears to have been enjoined by statute upon the municipality with respect to the creek; nor was any created by an assumption of the undertaking to control and to restrain, under all circumstances, its waters. The creek had been, from early times, the natural drainage outlet for the territory

and it became such for the city upon its banks. The right of the city to make use of it for that purpose is beyond question; whether from long use by the community, or from legislative recognition. The situation, and instances in its history, sufficiently advised the inhabitants of the menace from an overflow of the stream, through the inability to carry off in its channel any extraordinary quantity of waters precipitated by melting snows, or excessive rains. But, aside from the plainly discretionary nature of the powers vested in the municipal government with respect to the subject, the exercise of those powers was fraught with many obvious difficulties. It was confronted with a serious problem in a situation, not created by its own acts, but by nature. If the difficulty could be met and danger could be averted, the duty of corporate action was one calling for the exercise of deliberate judgment and discretion.

The question of municipal responsibility for insufficient, or for defective, sewerage, has been, not infrequently, the subject of discussion in the decisions of this court and the reasoning in some of the cases is not without its pertinence. In *Mills v. City of Brooklyn*, (82 N. Y. 495), the complaint was for the insufficiency of the sewer to carry off the water from the streets; in consequence of which the plaintiffs' premises were flooded and their building was injured. In deciding adversely to the claim of the plaintiffs for damages, it was held that "the duty of draining the streets and avenues of a city, or village, is one requiring the exercise of deliberation, judgment and discretion. It cannot, in the nature of things, be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequences of water falling from the clouds upon it. The duty is . . . of a judicial nature; for it requires the qualities of deliberation and judgment. It admits of a choice of means and of the determination of the order of time in which improvements shall be made." Again, it was said, "It may, therefore, be laid down as a very clear proposition, that if no sewer had been constructed at the locality referred to, an action would not lie against the corporation, though the jury should find that one was necessary." In *Seifert v. City of Brooklyn*, (101 N. Y. 136), the plaintiff recovered the damages, which had been occasioned by inundations of the district of his residence, through a defective construction of the sewers. In the opinion, the cases were reviewed and the principle of the immunity of municipal corporations from liability for damages occasioned, either by an insufficiency of the plan of an improvement, or by the neglect to exercise the power to make desired improvements, was asserted. In that case, the liability of the defendant was upheld, upon the ground that its acts had resulted in the creation of a nuisance. It was observed that "while the corporation was under no original obligation to the plaintiff, or other citizens, to build a sewer at the time and in the manner it did, yet, having exercised the power to do so and thereby created a nuisance on his premises, it incurred a duty, having created the necessity

of its exercise, and having the power to perform it, of adopting and executing such measures as should abate the nuisance and obviate the damage." In *Byrnes v. City of Cohoes*, (67 N. Y. 204), the plaintiff's property had been damaged by a flood of water, collected from the streets, which, but for the curbing and guttering, would have passed away in a natural watercourse. It was held that "the cases . . . to the effect that a municipal corporation is not liable for an omission to supply drainage, or sewerage, do not apply to a case where the necessity for the drainage, or outlet, is caused by the act of the corporation itself."

It seems to me to be very clear, therefore, that the omission of the municipal authorities of the city of Syracuse to make provision for obviating the danger of an overflow of the creek was not the neglect of an absolute duty, which made the corporation liable for the damages of which the plaintiff complains. Assuming that there was a duty, which could have been effectively performed, and assuming that the municipality had the control, neither reason, nor authority, supports the contention that the failure to exercise the governmental power of acting upon a matter, not relating to some special interest, nor to some undertaking assumed, nor commanded by any legislative enactment, imposed a responsibility upon the corporation for what might happen injuriously to the citizens through the occurrence of an extraordinary flood. In *Cain v. Syracuse*, (*supra*), it was said, with respect to the failure of the common council to exercise the power to direct the tearing down of a wall, which had been made dangerous by a fire and from the fall of which the plaintiff's intestate had been killed, that, assuming the power existed, "did a duty result so absolute, certain and imperative, as to found a right of action upon the omission? We must consider the nature and scope of the duty and, in so doing, must not be misled by the test, which makes permissive words absolute and a command. That test . . . will not serve to make a duty, which is inevitably and inherently discretionary, nevertheless ministerial, because the public have an interest in its exercise, or the rights of individuals may be affected by it." In this case, the power may be conceded to have existed in the common council to have ordered works, or to have put into execution plans, for averting the possible recurrence of freshets and floods; but it did not act, whether from inability to devise any satisfactory plan, or for any other reason, is immaterial; and its non-action, like that of the state legislative body, could create no cause of action. The plaintiff and the other citizens affected by the flood were no worse off than they would have been if the creek had not been used at all for sewerage purposes, except for the incidental deposit of sewage matter. The drainage of sewers into the channel, however, did not cause the flood, although naturally contributing to the volume of the stream. The flood was an extraordinary and an unusual one, resulting from the natural causes of the action of the elements and of the lay of the land.

I have given my reasons, at some length, in view of the importance of the case, not only in its possible bearing upon other damage cases, but in the application of the principle of municipal liability in such cases, and I advise that the judgment appealed from should be reversed and that a new trial should be ordered; the costs to abide the event.

CULLEN, Ch. J., O'BRIEN, HAIGHT and VANN, JJ., concur; EDWARD T. BARTLETT and WERNER, JJ., dissent.

Judgment reversed, etc.

WHEELER v. CITY OF CINCINNATI.

1869. 19 *Ohio State*, 19.¹

*Inadequate
evidence*

THE plaintiff brought his action in the court of common pleas of Hamilton county, seeking to recover from the defendant the damages arising from the casual destruction of his house (situated within the limits of said city) by fire; on the ground that the defendant had failed and neglected to provide the necessary cisterns and suitable engines for extinguishing fires, in that quarter of city in which his said house was situated, and that certain officers and agents of the fire department of said city had neglected and failed to perform their duties in regard to the extinguishing of said fire, by reason whereof said fire was not extinguished, as it otherwise might, and could have been. A demurrer to his petition, alleging these facts, was sustained by the court, and judgment rendered for the defendant, which was subsequently affirmed by the district court, upon proceedings in error.

The plaintiff now seeks a review and reversal of those judgments, on the ground of error in sustaining the demurrer to his petition.

J. T. Crapsey and Collins & Herron, for the motion.

J. Bryant Walker (Walker & Conner), contra.

BY THE COURT. The laws of this State have conferred upon its municipal corporations power to establish and organize fire companies, procure engines and other instruments necessary to extinguish fire, and preserve the buildings and property within their limits from conflagration; and to prescribe such by-laws and regulations for the government of said companies as may be deemed expedient. But the powers thus conferred are in their nature legislative and governmental; the extent and manner of their exercise, within the sphere prescribed by statute, are necessarily to be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such powers, the corporation cannot be held liable to individuals. Nor is it liable for a neglect of duty on the part of fire companies, or

¹ Arguments omitted. — Ed.

their officers, charged with the duty of extinguishing fires. The power of the city over the subject is that of a delegated quasi sovereignty, which excludes responsibility to individuals for the neglect or non-feasance of an officer or agent charged with the performance of duties. The case differs from that where the corporation is charged by law with the performance of a duty purely ministerial in its character. We know of no case in which an action like the present has been held to be maintainable. *Brinkmeyer v. Evansville*, 29 Ind. R. 187; *Western College of Medicine v. City of Cleveland*, 12 Ohio St. R. 375.

Leave to file petition in error refused.

HAYES v. CITY OF OSHKOSH. 175

1873. 33 Wisconsin, 314.¹

ACTION against the city to recover the value of property destroyed by a fire which was caused by negligence in working a steam fire engine belonging to the city. Said engine was being operated at the time to extinguish a fire in the barn of one of plaintiff's neighbors; and was under the control of engineers employed and paid by the city. The city charter provided, in substance, that the common council should procure fire engines, and have charge and control of the same; also that the council should appoint competent officers and firemen, define their duties, fix their salaries, and remove them at pleasure.

|| Negl. in operating fire engine, causing fire on 11.5 p.p.

Verdict directed for defendant. Plaintiff appealed.

C. Coolbaugh & Son, for appellant.

W. R. Kennedy, (*Gabe Bouck* with him,) for the city.

DIXON, C. J. The question presented in this case is settled by authority as fully and conclusively as any of a judicial nature can ever be said to have been. The precise question may not have been heretofore decided by this court, but a very similar one has, and the governing principle recognized and affirmed. *Kelley v. Milwaukee*, 18 Wis. 83. Neither the charter of the city of Oshkosh, nor the general statutes of this state, contain any peculiar provision imposing liability in cases of this kind; and the decisions elsewhere are numerous and uniform, that no such liability exists on the part of the city. The case made by the plaintiff is in no material respect distinguishable from those adjudicated in *Hafford v. New Bedford*, 16 Gray, 297, and *Fisher v. Boston*, 104 Mass. 87, as well as in several other reported decisions cited in the briefs of counsel, and in all of which it was held that the actions could not be maintained.

The grounds of exemption from liability, as stated in the authorities last named, are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which

¹ Statement abridged. Arguments omitted. — Ed.

false
agency
any conduct

It derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants, or of the community; that the members of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given; and hence the maxim *respondet superior* has no application.

The reasons thus given are satisfactory to our minds, and lead to a conclusion which on the whole seems to us to be just and proper. Individual hardship or loss must sometimes be endured in order that still greater hardship or loss to the public at large or the community may be averted. It would seem to be a hard rule which would hold the city responsible in damages in such cases, when the work in which it, or rather its public officers are engaged, is one of mere good will, a charity, so to speak, designed for the relief of suffering members of the community, or it may be of the entire people of the district. If the legislature sees fit to enact such liability, so let it be; but, in the absence of such enactment, we must hold the liability does not exist.

By the Court. — Judgment affirmed.

WILD v. PATERSON.

176

1885. 47 New Jersey Law, 406.¹

On demurrer to declaration.

active condition
on fire engine

The action is in case. The declaration avers that the city of Paterson, under the authority and direction of its charter, maintained a fire department, of which plaintiff was a member, attached to a certain company, which used a steam fire engine; that it was the duty of the city to provide for that engine a brake and to keep it in good order and repair; that by reason of failure on the part of the city to perform this duty, plaintiff, while assisting to haul the engine to a fire was run over and seriously injured. For the injury thus received plaintiff seeks to recover damages.

A demurrer to this declaration was interposed.

Henry & Dickinson, and *Herbert Stout*, for plaintiff.

F. Scott, and *John W. Griggs*, for defendants.

MAGIE, J. It has been settled beyond the possibility of further contention in this state, that municipal corporations are not liable to action

¹ Arguments omitted. — Ed.

for neglect to perform or negligence in performing duties imposed on them by law and due to the public, in behalf of any individual suffering damage by reason of such negligence, unless an action is given by statute. Where the employees or officers of a municipal corporation are negligent in the performance of such duties, the doctrine of *respondeat superior* will not apply. *Livermore v. Board, &c.*, 2 *Vroom* 508; *Pray v. Jersey City*, 3 *Vroom* 394; *Cooley v. Freeholders, &c.*, 3 *Dutcher* 415; *Freeholders, &c., v. Strader*, 3 *Harr.* 108; *Condict v. Jersey City*, 17 *Vroom* 157.

The duty of the city of Paterson to maintain a fire department is manifestly a duty owed to the public and imposed by law. Any one injured by negligence in the performance of that duty, will be debarred from action for such injury by the well-settled rule above stated.

Plaintiff's contention is that his case is exceptional, and not within the rule, upon the ground that the duty of keeping the machinery used for extinguishing fires in good order, is, as respects those who are employed in its use, a private duty, owed, not to the public, but to the employee.

Minuterial?

But the distinction thus sought to be made is, in my judgment, merely specious.

It does not appear what was the precise relation between plaintiff, as a member of the fire department, and the city. Whether his services were voluntarily rendered or were paid for, is not disclosed. But in either case the relation is not the ordinary relation of master and servant. Employees of such corporations in the execution of its public duties have been held to be mere instruments in the performance of such duties, and to act as public officers charged with a public service. *Condict v. Jersey City, supra.*

The duty to provide and maintain apparatus for extinguishing fires is plainly included within the public duty of establishing a fire department for that purpose. The city, as a corporation, derives from it no special benefit or advantage. The duty is single and undivided, and although the city must perform this duty by means of agents or officers, it owes to them no special duty, differing either in kind or degree from the duty which it owes to others in this respect. The duty is of a public character, and on grounds of public policy its neglect will not give a right of action to any individual in the absence of a statute. If there are any reasons for a modification of this rule with respect to employees of such corporations engaged in hazardous service, they cannot be considered by the courts. The rule can only be modified by the legislature. In the absence of legislation the plaintiff is within the rule and plainly without a right of action.

For this reason the city is entitled to judgment on the demurrer.¹

¹ See *Pettingell v. Chelsea*, 161 Mass. 368, 37 N. E. 880, 24 L. R. A. 426; *Kies v. Erie*, 135 Pa. 144, 19 Atl. 942, 20 Am. St. Rep. 867.

SPRINGFIELD FIRE &c. INSURANCE CO. v. VILLAGE OF KEESEVILLE.

1895. 148 *New York*, 46.¹

APPEAL from judgment of the General Term of the Supreme Court in the Third Judicial Department [reported in 80 Hun, 162].

The complaint sets forth that the plaintiff is a Massachusetts corporation and that the defendant is a village organized under the provisions of chapter 291 of the Laws of the state of New York, passed in 1870, and the amendments thereto; that the plaintiff carried on the business of fire insurance within the limits of the defendant, and for the privilege of so doing, and of having the protection of the water works and fire department and appliances of defendant, had paid an annual tax to the defendant; that the defendant had a system of water works and fire appliances, which were maintained by taxes levied upon all its taxable inhabitants, including plaintiff and other insurance companies, and by water rents paid by such inhabitants. The complaint then proceeds to set forth the insurance by the plaintiff of property of one Emily E. Brewer, for a percentage less than for like property outside the limits of the water and fire protection, and the destruction by fire thereof; in consequence whereof the plaintiff had paid to her, under its contract of insurance, \$4,450. The complaint then sets forth the assignment to plaintiff by Emily E. Brewer of all claims and damages against the defendant, by reason of said fire and damages, and alleges that "at the time of the aforesaid fire, the defendant had wrongfully and negligently allowed and caused its said water works, pumps, pipes and fire appliances to become and be out of repair, broken and weakened, stopped with mud and other foreign objects, and unfit for use, to such extent that water could not be thrown or put upon said dwelling house to extinguish the fire therein; that when the hose was laid and opened, and ready to throw water upon the fire in said house, said fire was very slight and had done very little damage; that if said fire appliances and water works had been in proper working order said fire would and could have been extinguished without damaging said house to exceed three hundred dollars; that at the time of said fire, and for several years previous thereto, the defendant, under and in pursuance of the powers granted it by the laws of the state of New York² had assumed to maintain water works and

¹ Statement abridged. Arguments omitted. — Ed.

² "The complaint must be read in connection with the statutes governing the defendant; they are as much a part of the complaint as if written in it.

"The defendant was authorized by Chapter 181 of the Laws of 1875, and various acts amendatory thereof, to construct and maintain water works to supply its inhabitants with water.

fire appliances and a fire department for the purpose, among other things, of protecting the property of the inhabitants of defendant against loss by fire, of all which plaintiff and its assignor had notice, and in reliance thereon said assignor paid taxes to defendant to maintain the same, and plaintiff paid taxes to defendant for said purpose, and insured property at reduced rates as aforesaid; . . . that plaintiff's aforesaid loss of \$4,450, to the extent of at least \$4,150, was caused solely by the negligence and wrongful and unlawful acts of defendant, in failing to keep its water works and fire appliances in proper working order, and in failing to employ competent men to manage and care for the same." The complaint then demanded judgment for the said sum of \$4,150.

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

At the General Term the demurrer was overruled.

Chester B. McLaughlin, for defendant.

A. W. Boynton, for plaintiff.

GRAY, J. The learned justice who spoke for the General Term, in a very elaborate and interesting opinion, proceeded, very correctly, as I think, upon the assumption that the negligence charged against the defendant in the complaint related entirely to its water works system. In the view which we take of the matter, it is of comparatively little consequence whether the plaintiff bases its right of action upon negligence with respect to the fire department as such, or to the water department as such. But the fair reading of the complaint undoubtedly warrants the assumption of the learned justice at General Term.

If I correctly apprehend the reasoning, which led the General Term to the conclusion that there was a municipal liability upon an admission of the facts set forth in the complaint, it rests, in the main, upon two theories. In the first place it is held that by the voluntary assumption on the part of the defendant of the power conferred by statute to construct and maintain water works, it became responsible for the proper exercise of such power and that such responsibility is necessarily demanded in the interest of an efficient public service, and the inhabitants, who have contributed to the maintenance of such a public work, have a right to hold the defendant to the exercise of reasonable care and diligence and to a liability for a failure to do so. In the next place, it is held, while not deeming that the defendant had engaged in a private corporate business,

"The president and trustees constitute the board of water commissioners. (Chap. 74, Laws of 1891.)

"The defendant receives rents for supplying water; it has control over all the employees connected with the water works; it can employ and discharge them at pleasure; they are its servants. The construction and maintenance of the water works is something that was not forced upon it by the power of the state; it could act under the law authorizing it to construct and maintain water works, or refuse to act, at its pleasure. . . ." HERRICK, J., in 80 Hun, pp. 167, 168. — Ed.

conducted for its own benefit and not for the general public, nevertheless, that the defendant having agreed to erect and take charge of the public work and enterprise for the public within its boundaries, if there is a failure to exercise reasonable care and diligence in maintaining it, there has been a breach of an implied contract, for which, if injury results, an action will lie. Holding these views, the learned General Term felt compelled, ~~because of the admission by the defendant, through its demurrer, of the allegations of wrongful and neglectful conduct in relation to the maintenance of its water works, to hold that the plaintiff made out a good cause of action.~~

The proposition that such a liability rests upon a municipal corporation, as is asserted here, is somewhat startling and I think the learned General Term justices have misapprehended the nature of the responsibility, which devolved upon the defendant in connection with its maintenance of a water works system, as well as the character of the power which it was authorized to exercise in relation thereto. I might remark, in the same spirit of criticism which was assumed by the learned justice at General Term, that while the efficiency of the public service would be promoted by holding municipal corporations to the exercise of reasonable care and diligence in the performance of municipal duties and to a liability for injury resulting from a failure in such exercise, the application of that doctrine to such a case as this might, and probably would, be highly disastrous to municipal governments. A little reflection will show that a multitude of actions would be encouraged, by fire insurance companies, as by individuals, and that cases have arisen, and may still arise, where an extensive conflagration might bankrupt the municipality, if it could be rendered liable for the damages or losses sustained.

The distinction between the public and private powers conferred upon municipal corporations, although the line of demarcation at times may be difficult to ascertain, is generally clear enough. It has been frequently the subject of judicial discussion and, among the numerous cases, it is sufficient to refer to *Bailey v. The Mayor* (3 Hill, 531); *Lloyd v. The Mayor* (5 N. Y. 369) and *Maxmilian v. The Mayor* (62 id. 160). The opinion in *Darlington v. The Mayor* (31 N. Y. 164) is also instructive upon the subject. When we find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in its nature and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature and the municipal corporation, in respect to its exercise, is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for non-user or misuser; while in the latter case, it may be held to that degree of responsibility which would attach to an ordinary private corporation. Then, the investiture of municipal corporations by the legislature with admin-

istrative powers may be of two kinds. It may confer powers and enjoin their performance upon the corporation as a duty; or it may create new powers to be exercised as governmental adjuncts and make their assumption optional with the corporation. Where a duty specifically enjoined upon the corporation as such has been wholly neglected by its agents and an injury to an individual arises in consequence of the neglect, the corporation will be held responsible. (*Mayor v. Furze*, 3 Hill, 612, 619.) So, in *McCarthy v. Syracuse* (46 N. Y. 194), it was held that where a duty of a ministerial character is imposed by law upon the corporation, a negligent omission to perform that duty creates a liability for damages sustained. Such responsibility, however, would not attach to the corporation where it has voluntarily assumed powers, authorized by the legislature under some general provision respecting municipalities throughout the state and permissive in their nature; and at this point I touch one of the theories upon which the General Term decision seems to rest. In such a case — and I speak, of course, of legislative acts which are general in their nature and scope — the assumption by the municipal corporation is of a further function of self, or local, government and such a power is discretionary in its exercise, and carries with it no consequent liability for non-user or misuser. In the legislature reside the power and force of government, confided to it by the People under constitutional restrictions. In the creation of municipal corporations subordinate commonwealths are made, upon which certain limited and prescribed political powers are conferred and which enjoy the benefits of local self government. (*People ex rel., etc., v. Detroit*, 28 Mich. 228.) When, in addition to those general powers which are prescribed upon the creation of a municipal corporation, general statutes permit the assumption of further powers as a means of benefiting the portion of the public in the particular locality, they invest the corporation availing itself of the permission with just so much more governmental power. Just as the general powers deposited with the various municipalities are exercised by them in a quasi sovereign capacity, so would any added powers designed for the general public good, though optional with the corporation as to their assumption, and in their exercise and performance local, be exercised. They are not special, as being designed for and granted to a particular municipality; for they are applicable to every part of the body politic where municipal government exists. Such powers, in legal contemplation, appertain to the municipal corporation as such, and may be adopted as a part of the governmental system.

The acts, under which the defendant was authorized to construct and maintain a system of water works, constitute a general law, applicable to all incorporated villages in the state. They impose no duty and, when availed of, the task undertaken is discretionary in its character. The grant of power must be regarded as exclusively for public purposes and as belonging to the municipal corporation,

when assumed, in its public, political or municipal character. In *Bailey v. The Mayor* (3 Hill, 531), to which reference is made in the opinion below, the city of New York, at a very early day, was authorized by special legislation to engage in the work of supplying its citizens with water and to acquire lands and water rights for the purpose and, as it is clear from the reading of the opinion of Chief Justice NELSON, the city was regarded in the light of any other private company, because of the special franchises conferred. Assuming that we could regard the doctrine of that case as authoritative at the present day, as to which there has been, and might be, some question, (see *Darlington v. The Mayor, etc., of New York, supra*), the decision is inapplicable to the present case. In *Hunt v. The Mayor* (109 N. Y. 134) the case turned upon the performance by the city of the duty cast upon it to keep its streets in a safe condition for travel. In *Cain v. Syracuse* (95 N. Y. 83), the discussion was as to the nature of the duty imposed upon the defendant by the power in its charter to pass ordinances, among other things, for the razing of buildings which had become dangerous by reason of fire. The failure of the common council to pass a resolution in respect to the building in question was not deemed to be a neglect of a duty. It was a discretionary matter. Nothing was decided in that case, which controls the decision of the present case, or which affects the discussion materially.

Nor can we assent to the view that the defendant sustains such an implied contractual relation to the public within its boundaries, with respect to the construction of this public work, as to be responsible for a failure to exercise reasonable care and diligence in respect to its maintenance. If the views which I have, somewhat briefly, expressed are correct, the defendant exercised a function which, like all governmental functions, was purely discretionary. What it undertook to do, when availing itself of the privilege of the general act, was to provide for the local convenience of its inhabitants.

The industry of the defendant's counsel has collated a great number of decisions by the courts of other states, which indicate a very general view that the powers conferred by the law of the state upon its municipal corporations to establish water works and fire departments, are, in their nature, legislative and governmental. From them I may select one or two. In *Edgerly v. Concord* (62 N. H. 8), it was said by the court: "As a part of the governmental machinery of the state, municipal corporations legislate and provide for the customary local convenience of the people and in exercising these discretionary functions the corporations are not called upon to respond in damages to individuals, either for omissions to act or in the mode of exercising the powers conferred on them for public purposes and to be exercised at discretion for the public good. For injuries arising from the corporation's failure to exercise its public, legislative and police powers, and for the manner of executing those

powers there is no remedy against the municipality, nor can an action be maintained for damages resulting from the failure of its officers to discharge properly and efficiently their official duties."

In *Tainter v. Worcester* (123 Mass. 311), it was said by the court: "The protection of all buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are, therefore, authorized by general laws to provide and maintain fire engines, etc., to supply water for the extinguishment of fires. The city did not by accepting the statute and building its water works under it enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained."

In *Maxmilian v. The Mayor* (62 N. Y. 160), the reasoning of the opinion permits a clear inference that this defendant did not, by accepting the provisions of the statutes, assume a duty of the kind which arises from the grant of a special power. Judge FOLGER uses this language, in his discussion of the two kinds of duties which are imposed upon a municipal corporation: "The former" (referring to the case of a grant of a special power), "is not held by the municipality as one of the political divisions of the state." Again he says: "Where the power is intrusted to it as one of the political divisions of the state, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user, nor for misuser by the public agents;" citing *Eastman v. Meredith*, (36 N. H. 284).

This defendant, precisely, is entrusted with the power to maintain its water works, because it is one of the political subdivisions of the state to which the general act has reference in its general grant of power or privilege.

Nor does the fact that water rents are paid by the inhabitants of the defendant affect the question. This fact is made use of to show the private corporate character of the water works system; and the suggestion is that profit or benefits accrue to the defendant whereby the corporate undertaking is affected with a private interest. But that is an incorrect notion. The imposition of water rents is but a mode of taxation and a part of the general scheme for the purpose of raising revenue with which to carry on the work of government. If profits accrue over the expense of the maintenance of the system, they go to benefit the public by lessening the general burden of taxation.

The fallacy, as it seems to me, which affects the argument that the municipal corporation can be made liable for the non-user or misuser of its power, consists in that it fails to appreciate the true nature of the function which the corporation performs. It adds to its political machinery for the purpose of benefiting and of protecting its inhabi-

tants. There is nothing connected with the work, which is not of a governmental and public nature. It is in no sense a private business, and the authority to construct the works was given to it by the legislature, not at its own particular instance or application, but because it was one of the political subdivisions of the state and, as such, was entitled to exercise it. How could it justly be said that the maintenance of the water works system, any more than of a fire department, was a matter of private corporate interest? Is it not for all the inhabitants and for their good and protection? No interest was designed to be subserved, other than that of adding to the powers of a community carrying on a local government. If that is true, the alternative is that being for public purposes and for the general welfare and protection, the defendant assumed a governmental function and comes under the sanction of the rule which exempts government from suits by citizens.

Further elaboration of the subject is quite possible; but the views expressed seem sufficient to justify the conclusion that the determination reached by the General Term was erroneous.

The order and judgment appealed from should be reversed and the judgment entered at the Special Term should be affirmed, with costs.

All concur (BARTLETT, J., upon grounds stated in the opinion, and also upon the further ground that this court decided the principle here involved in *Hughes v. The County of Monroe*, 147 N. Y. 49).

Ordered accordingly.

RUSSELL v. TACOMA. 178

1894. 8 Wash. 156.

ANDERS, J. The City of Tacoma is a city of the first class. Its charter was framed and adopted in accordance with the provisions of the act of the legislature, entitled "An act to provide for the government of cities having a population of twenty thousand or more inhabitants, and declaring an emergency," approved March 24, 1890 (Laws 1889-90, p. 215). Cities organized under this act are empowered to "lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and other public grounds, and to regulate and control the use thereof," and these provisions of the statute are incorporated into and are a part of the city charter.

By an act of congress, approved December 17, 1888, there was granted to the city of Tacoma a license to occupy and control for the purposes of a public park for the use and benefit of the citizens of the United States, and for no other purposes whatever, a certain

described tract of land known as Point Defiance Park. This license is subject to the condition expressed in the act, that the United States may take possession of and occupy said land, or any part thereof, for military or other purposes whenever the proper officers of the United States may see fit to do so.

The charter of the city of Tacoma provides for a board of park commissioners, consisting of five members, to be appointed by the mayor and confirmed by the city council; and it is made the duty of the board, subject to such rules and regulations as the city council may by ordinance provide, among other things, to take charge of and exercise control over all parks belonging to the city, to make report to the city council from time to time regarding the condition of the parks, and to recommend appropriations by the council for the improvement of the parks, and when such appropriations have been made, expend the same in such improvements; but no member of said commission shall have power to create any debt, obligation, claim or liability except with the express authority of said commission, conferred at a meeting thereof duly convened and held; to make such rules and regulations in regard to the use of the parks as shall best subserve the interests of the public; and generally, to do all things necessary and proper to secure for the public the free use and enjoyment of said parks.

While the board of park commissioners were in possession of Point Defiance Park, and were improving the same for park purposes, appellant was injured by an explosion of giant powder and dynamite which occurred in a building erected thereon by the commissioners. It appears that at the time of the explosion the appellant was a laborer under the control of a foreman employed by some one connected with the board of park commissioners, and that the powder and dynamite which exploded were stored in a building used for the purposes of a blacksmith shop and for storing tools. The blacksmith was engaged in sharpening tools, and the explosives were ignited by sparks from his forge or anvil. This action was brought to recover damages for injuries to the person and property of the appellant, alleged to have been caused by the carelessness and negligence of the city in thus storing dangerous explosives in the place above mentioned. The court below held that the city was not liable, and dismissed the action, and plaintiff appeals.

The only question necessary to be determined is, whether the city is liable for malfeasance or misfeasance of its officers while employed in the prosecution of a public work of the character of the one under consideration. It is contended by the learned counsel for the appellant that the board of park commissioners while engaged in this work were but agents of the city, and that the work itself was but a private enterprise undertaken by the city for its own benefit, and if this be true there is no doubt that the city is liable to the same extent that a private corporation or individual would be liable under the same circumstances.

As supporting the appellant's contention, that the improvement of Point Defiance Park was an improvement of mere local concern, affecting merely the interests of the municipality, we are cited to the case of *State, ex rel. Wood, v. Schweickardt*, 109 Mo. 496 (19 S. W. 47). It appears from an examination of this case that the city of St. Louis was the owner of Forest Park, and, under the power given it by law, was attempting to lease a portion of it for the sale of intoxicating liquors and other refreshments at the park. Proceedings were instituted by the attorney general, in the name of the state, to prevent the city from so doing, and the court held that —

"In relation to the property in question, and the discretionary control of the city over it, it must be regarded as a matter of purely local concern, as held and owned by the city not in its political or governmental capacity, but in a *quasi* private capacity, in which the municipal authorities act for the exclusive benefit of the corporation whose interests they represent."

We have no doubt of the correctness of that decision, and, if the facts were the same in the case at bar, that case would be cheerfully recognized as high authority in favor of the appellant's contention. But in one respect at least the facts of this case are essentially different. There the city was the owner of the park and was leasing it for its own private emolument. In this case the city of Tacoma is not the owner of Point Defiance Park, and has no interest in it whatever excepting a license to occupy and control it for the purposes of a public park. It is frankly conceded on behalf of the appellant that if the acts complained of were not proprietary merely, but public and governmental, the city is not liable in this action. While it is not always easy to draw the line between the public, or governmental, and private powers of municipal corporations, we think the respondent city, under the facts in this case, in improving the park, was exercising a power or franchise conferred upon it for the public good and not for private corporate advantage. And this being so, it is not liable for the acts or omissions of its officers in that behalf. *Murtaugh v. City of St. Louis*, 44 Mo. 479; *Hart v. Bridgeport*, 13 Blatchf. 289; *Richmond v. Long's Adm'rs*, 17 Grat. 375; *Mead v. New Haven*, 40 Conn. 72; *Ham v. Mayor, etc.*, 70 N. Y. 459; *Tindley v. Salem*, 137 Mass. 171; *Howard v. Worcester*, 153 Mass. 426 (12 L. R. A.; 27 N. E. 11); *Curran v. Boston*, 151 Mass. 505 (24 N. E. 781); *Sherbourne v. Yuba County*, 21 Cal. 118.

See distinction

In *Murtaugh v. St. Louis, supra*, it was sought to make the city of St. Louis respond in damages for injury to a non-paying patient caused by the negligence of hospital officers and servants, and in speaking of the non-liability of municipal corporations for the acts of their officers and agents, the court declared the general result of the authorities as follows:

"Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private bene-

fit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants."

The same doctrine was enunciated in other cases above cited; and in *Mead v. New Haven* it was accordingly held that the city was not liable for the negligence of an inspector of steam boilers, and in *Ham v. Mayor*, that the city was not liable for the negligence of servants employed by the department of public instruction. In *Tindley v. Salem* it was held, upon an elaborate review of the authorities, that the defendant city was not liable for the negligence of its servants in discharging fireworks which were purchased and used for the purposes of a public celebration. In *Howard v. Worcester* the plaintiff was injured by the negligent blasting of rock in excavating the foundation for a public school house, and the court held that as the work was purely a benefit to the public, no liability was thereby created against the city. See also *Condict v. Jersey City*, 46 N. J. Law, 157; *Bryant v. St. Paul*, 33 Minn. 289 (23 N. W. 220); and *Barney v. Lowell*, 98 Mass. 570.

Upon the liability of towns for defects in their public commons, the supreme court of Massachusetts, in *Clark v. Waltham*, 128 Mass. 567, said:

"The plaintiff was injured while travelling upon a public park having footpaths across it, which, it is alleged, the defendant had negligently suffered to be out of repair and unsafe. The park was conveyed to the town upon the condition that it should 'forever after be kept open as and for a common for the use of said inhabitants of the town of Waltham.' By accepting the deeds of conveyance, the town agreed to the condition, and therefore holds the park for the use of the public. It had constructed footpaths and walks over the park in various directions, but these paths were not a part of the system of highways. They were not laid out as public ways, and the town is not liable under the statutes respecting highways or townways for any defect or want of repair which may exist in them. *Oliver v. Worcester*, 102 Mass. 489; *Gould v. Boston*, 120 Mass. 300. Nor can the town be held liable upon the ground that it negligently suffered a dangerous place to exist in the park, and failed to give proper notice to persons using the park by its invitation or license. It holds the park, not for its own profit or emolument, but for the direct and immediate use of the public.

"If it can be said that there is any duty in the town to construct paths over it, or to keep such paths in repair, it is a corporate duty, imposed upon it as the representative and agent of the public and for

the public benefit. For a breach of such a duty, a private action cannot be maintained against a town or city, unless such action is given by statute."

Other reasons are urged by counsel for respondent for sustaining the judgment of the lower court, but as what we have said disposes of the case, it is not necessary to discuss the points made.

The judgment is affirmed.

DUNBAR, C. J., and HOYT, STILES and SCOTT, JJ., concur.

d. NEGLIGENCE IN THE PERFORMANCE OF A COMMERCIAL FUNCTION.

WORDEN v. CITY OF NEW BEDFORD. 179

1881. 131 Massachusetts, 23.¹

TORT for personal injuries occasioned to the plaintiff by falling through a trap-door in a room in a public building in the defendant city, known as the City Hall. Answer, a general denial. At the trial in the Superior Court, before *Brigham, C. J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the substance of which appears in the opinion.

The case was argued at the bar, and was afterwards submitted on additional briefs, by *F. A. Milliken*, for the defendant, and *E. L. Barney*, for the plaintiff.

MORTON, J. Under the instructions given them, the jury must have found that the city of New Bedford was the owner of a building known as the City Hall, used for the ordinary municipal purposes; that it had been accustomed to let it, for profit, for lectures, exhibitions, amusements and other like purposes, having no relation to municipal affairs or interests; that at the time the injury happened to the plaintiff it had, acting by its committee on public property, let the hall and a smaller room adjoining, for profit, to the Southern Massachusetts Poultry Association; that the sum paid by the association included compensation for the lighting and heating the rooms and for the services of the janitor, who, by appointment of the city, had the care of the building; that the plaintiff was injured solely by the carelessness of the janitor, while doing acts in the lighting and heating of the rooms; and that the plaintiff was rightfully in the rooms and using due care when he received the injury. These facts are sufficient to establish the liability of the city.

A city or town is not liable to a private citizen for an injury caused by any defect or want of repair in a city or town hall or other public

¹ Only so much of the opinion is given as relates to a single point. — Ed.

building erected and used solely for municipal purposes, or for negligence of its agents in the management of such buildings. This is because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all cities and towns alike, from the performance of which it derives no compensation.

~~But when a city or town does not devote such building exclusively to municipal uses, but lets it or a part of it for its own advantage and emolument, by receiving rents, or otherwise, it is liable while it is so let in the same manner as a private owner would be. *Oliver v. Worcester*, 102 Mass. 489. *Hill v. Boston*, 122 Mass. 344.~~

But the defendant contends that a city or town has no power to let its public buildings for private uses, that the letting to the poultry association, if made by the city, was *ultra vires*, and therefore it is not liable. This ground is untenable. The city could not erect buildings for business or speculative purposes, but having a city hall, built in good faith and used for municipal purposes, it has the right to allow it to be used incidentally for other purposes, either gratuitously or for a compensation. Such a use is within its legal authority, and is common in most of our cities and towns. *French v. Quincy*, 3 Allen, 9.

We are therefore of opinion that, upon the facts proved in this case, the defendant was liable; it was dealing with the city hall, not in the discharge of a public duty, but for its own benefit and gain in a private enterprise, in the same way as a private owner might, and was liable for negligence in the management of the property to the same extent as such private owner would be.¹

Exceptions overruled

MULCAIRNS v. CITY OF JANESVILLE.

1886. 67 Wisconsin, 24.²

ORROR, J. The complaint substantially charges that the city, being authorized so to do, about the 9th day of August, 1884, entered upon the construction of a cistern, for the use of the fire department of said city, for protection against fire; that the city was authorized to and did employ men in the construction of the same, and that about the 16th day of said month said city had made an excavation for said cistern and erected within the same a wall of stone masonry, along the sides of the same, resting upon the bottom of said excavation, about 40 feet long, 10 feet high, 20 inches in thickness, and about 12 feet wide; that it was so constructed by the city, in such a careless and negligent manner, and negligently allowed to so remain, to the knowledge of the

¹ See *Coughlan v. Cambridge*, 166 Mass. 268, 44 N. E. 218; *Nicholson v. Detroit*, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601.

² Statement and arguments omitted.—Ed.

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city, that on the day last aforesaid a portion of it fell upon Thomas Mulcairns, the husband of said plaintiff, who was employed by said city at that time in shovelling earth in the bottom of said cistern, in accordance with such employment, near said portion of the wall, having no knowledge of its unsafe condition and using due care and caution, and caused his death. He left the plaintiff as his widow, and seven minor children dependent upon her for support.

The answer admits the appointment of the plaintiff as administratrix, the incorporation of the city, that it was so engaged in the construction of a cistern, and that part of the wall thereof fell inward, and that Thomas Mulcairns was injured thereby, and died in consequence thereof; but denies all other allegations, and alleges that the cistern was being built by the city with all the care and caution possible to be used; and that the city employed workmen known to be skilful and careful, and used good material; *and employed one James Shearer to superintend and manage the construction of the cistern*, and that he was suitable to do so; and that said cistern was constructed in a skilful manner, without any negligence on the part of the city; and that the falling of said wall was caused or contributed to by the want of ordinary care of the deceased; and that the deceased entered upon his work with full knowledge of the dangerous condition of said wall.

The complaint most clearly states a cause of action against the city, and the first exception, which was to overruling a demurrer *ore tenus* to the complaint, was not error. The answer admits that the wall was built *by the city*, through the agency and under the superintendence of James Shearer, employed for that purpose by the city, and that when it was built it fell upon and killed the deceased.

1. The point made by the learned counsel of the appellant, that the city is not liable because it was in the performance of a public duty in which the city, as a municipal corporation, had no pecuniary interest, and the injury was occasioned by the act or omission of its officers or agents, may as well be disposed of here, because it arises as well upon the pleadings. James Shearer was not one of the public agents or officers of the city, but specially employed to superintend this particular work for the city. Such is the effect of the answer.

The case cited, and the first one on the question in this state, of *Hayes v. Oshkosh*, 33 Wis. 314, goes upon the doctrine generally recognized that when the agents acting for the city are not in the employment of the city, but act rather as public officers, such as the fire department provided for by law, and the city does nothing more than appoint its officers, such persons perform duties fixed by law and not special services contracted to be performed under employment of the city. The distinction between the two cases is very wide and quite apparent. If the city could not be held liable in such a case, it never could in any; for it is a common case of special employment for the

performance of special services for and on behalf of the city. It was the legal duty of the city to construct cisterns for fire purposes, and it was engaged in the attempted performance of this duty through its own private agencies, and not through the fire department or its officers, or other officers of the city whose duty it was to perform such work.

The case of *Spelman v. Portage*, 41 Wis. 144, which is clearly in point, most clearly points out these distinctions. The distinction is made perhaps more clearly in the cases of *Harper v. Milwaukee*, 30 Wis. 365, and *Little v. Madison*, 49 Wis. 605. Both the principle and the distinction of cases are fully considered and clearly established in our own cases, so that we need not concern ourselves very much about cases in other states, for the above cases were decided upon a full examination of authorities elsewhere.

[Remainder of opinion omitted.]

Judgment for plaintiff affirmed.

BARRON v. DETROIT. 181

893. 94 Mich. 601.

LONG, J. The facts in this case are not in dispute. It appears that in January, 1890, by resolution of the common council, the city engineer was instructed to prepare plans for the construction of a market building. The plans were prepared and submitted, in response to the resolution, and the board of public works was directed to advertise for proposals for constructing the building in accordance therewith. Proposals were advertised for, and the board of public works reported that Patrick Dee was the lowest bidder; and by instruction of the common council the board entered into a contract for the construction of the building with him, which contract was confirmed by the council. The plans were prepared by a draughtsman in the office of, and under the supervision of, the city engineer.

The building was an open structure, built on iron columns about 15 feet apart, surmounted by a roof composed of wood and iron. It was built in the form of a cross; being about 300 feet one way, and 400 feet the other. The columns rested upon stone piers, but were not anchored. At the time the plans were prepared, the propriety of anchoring the columns was discussed by the draughtsman and engineer. The draughtsman thought they ought to be anchored, but the engineer thought the construction strong enough, and his opinion was followed. He claims, however, to have looked the plans over hurriedly, and that he did not examine them carefully, for the reason that a competent superintendent was to be employed, and that the building would be properly constructed under him, and if any defect existed the omission

would be supplied as the work progressed. The superintendent was appointed, and the work carried on under the contractor. Before it was completed some members of the board of public works expressed the opinion that the structure was dangerous, and would go down in a wind; and on the advice of the city engineer it was examined by architects, and upon their recommendation several braces were added, to strengthen it. One of the architects thus called says that he advised the inserting of some strips, and putting bolts through them, and anchoring them down; that it should be anchored in some way. These suggestions were referred by the board of public works to the contractor, and he placed extra braces in the roof, but did not anchor the columns. It was testified by some of the architects that in such buildings, in this part of the country, 40 pounds to the square foot, wind pressure, is usually allowed; and it was further shown that the velocity of the wind, to exert 40 pounds pressure, is 90 to 100 miles an hour.

On December 23, 1890, in a wind blowing about 50 miles an hour, this market building fell, no other buildings in the vicinity being affected; so that it is apparent that the fault was in the failure to anchor the columns. The plaintiff was injured by the falling of the building. It is conceded that at the time he was lawfully upon the premises, having paid the usual license fee required and collected by the city. His claim for damages having been refused by the common council, this suit was brought, and he was awarded damages in the sum of \$1,000.

By the charter of the city of Detroit the common council is authorized to erect and maintain market houses, establish markets and market places, etc.

It is contended by counsel for the city that when the common council of the city authorized the making of plans and specifications for the market building, and directed the making of the contracts for its construction, it performed a purely legislative function; that the fault which occasioned the collapse of the building was in the plan, which failed to provide for anchoring it so that it could not be lifted from its foundation by the wind; that there was evident miscalculation as to the weight being sufficient to keep it in place. Counsel insists that the fault is with legislative action, and therefore a suit grounded upon it is grounded upon a wrong attributable to the legislative body itself, as the determination to construct the public work and the prescribing of the plans, are matters of legislation on behalf of the city, under the direction of its legislative body; that in carrying out the plans there may be negligence attributable to ministerial officers, but negligence in the plans themselves must be attributable to the body that devised, ordered, or adopted them, — and therefore the action cannot be maintained, under the principle applied in *Larkin v. County of Saginaw*, 11 Mich. 88; *City of Detroit v. Beckman*, 34 Id. 125; *City of Lansing v. Toolan*, 37 Id. 152; *Davis v. City of Jackson*, 61 Id. 530.

This contention would undoubtedly be correct if the city had been acting purely in a matter of public concern, in its governmental capacity or character, and the cases cited would then be applicable. In *Larkin v. County of Saginaw* the plaintiff sought to recover for damages caused by a defective bridge, and it was held that the county was not liable for the acts of the board of supervisors in the exercise of its legislative power. In *Detroit v. Beckman*, *City of Lansing v. Toolan*, and *Davis v. City of Jackson*, the actions were for injuries caused by defects in public highways. In each of these cases it was held that, when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, the fault is with legislative action, for which no action can be maintained. *Ashley v. City of Port Huron*, 35 Mich. 296, is to the same effect.

Judge Dillon, in his work on *Municipal Corporations* (4th ed., § 66), states the rule as follows: A municipal corporation—

“Possesses a double character: The one, governmental, legislative, or public; the other, in a sense, proprietary or private. The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, or officers, in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state, rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the constitution of the particular state. But, in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community, which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded, *quo ad hoc*, as a private corporation, or at least not public in the sense that the power of the legislature over it, or the rights represented by it, is omnipotent.”

This rule is supported by a great number of authorities from the several states, and from the decisions of the Supreme Court of the United States, in the note to the section above quoted. It is, however, challenged by Denio, C. J., in *Darlington v. Mayor*, 31 N. Y. 164. He asserts the unlimited power of the legislature over municipal corporations

and their property, and maintains that such corporations are altogether public, and all their rights and powers public in their nature, and that their property, though held for income or sale, and unconnected with any use for the purposes of municipal government, is under the control of the legislature, and not within the provisions of the constitution protecting private property. He denies the distinction between the public and private functions of city governments, and maintains that, as respects the state, all their powers and functions are public. This doctrine, however, has not obtained in this state; but it is held that cities are mentioned in our Constitution, in connection with local corporations, which are put upon a popular basis entirely beyond legislative interference, so far as local independence of action is concerned. Opinion of Campbell, C. J., in *People v. Hurlbut*, 24 Mich. 86.

In *Board of Park Commissioners v. Common Council*, 28 Mich. 228, it was said by Mr. Justice Cooley:

"We also referred, in *People v. Hurlbut*, to several decisions in the Federal Supreme Court, and elsewhere, to show that municipal corporations, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities, and as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in state government. If the authorities are examined it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as *private*, in contradiction to those in which the state is concerned, and which are called *public*; thus putting these corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations."

This same distinction was also made in *City of Detroit v. Corey*, 9 Mich. 165; *Mayor v. Park Commissioners*, 44 Id. 602; *Niles Water Works v. City of Niles*, 59 Id. 324; *Cooper v. Detroit*, 42 Id. 584.

Under the facts in this case, the city must be held to the same degree of care, not only in the construction, but in the plan of the construction itself, as would a private corporation or an individual. Under the provisions of the charter granting the power to erect it, there was no imperative duty cast upon the city to provide for a market building. It could build it or not, as the council might determine. It is not like the case of a public highway, or the building of a bridge, where the duty is cast upon the municipality, by general law, to build and maintain them. Had this building been owned by an individual or a private corporation, the liability of either for this accident would not have been questioned, under the facts stated.

The judgment must be affirmed, with costs.

The other Justices concurred.

CITY OF PEKIN v. McMAHON. 182

1896. 154 Ill. 141.

THIS is an action on the case brought by appellee, as administrator of the estate of his deceased son, Frank McMahon, against appellant, the City of Pekin, to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of said City. Verdict and judgment in the Circuit Court were in favor of the plaintiff. The Appellate Court has affirmed the judgment, and the present appeal is from such judgment of affirmance.

The declaration alleges, that, on April 12, 1892, the City owned lots 7, 8, 9 and 10 in Block 11 in Bailey's Addition to Pekin; that, for a long time before that date, it had caused a dangerous hole or pit to be made in said lots by digging therein and removing sand and gravel therefrom; that it permitted water to accumulate and remain in said hole or pit, so that it became a nuisance and dangerous to the lives of citizens and "of children of tender years incapable of exercising ordinary care or discretion who might be attracted thereto;" that it was defendant's duty to cause the same to be drained, so as to remove the water therefrom; that the deceased, a child of tender years and incapable of exercising ordinary care or discretion, was attracted thereto, and necessarily and unavoidably, on account of defendant's failure to drain the water from said pit, without fault on his part or on the part of his parents, fell into the said pit, and was drowned.¹

The plea was the general issue, with notice of special matter of defense to the effect, that the premises were the property of the city; that it was incorporated under the general Act of incorporation; that the lots were enclosed by a fence on the east and west sides thereof and nearly enclosed on the south and north sides thereof; that the deceased entered and remained upon the premises as a mere trespasser, and engaged in play without the knowledge, permission or invitation of defendant, and carelessly, accidentally or negligently fell into a pool of water thereon, and was drowned.¹

MAGRUDER, J. *First*, the main question in the case arises out of the refusal of the trial Court to give the second and third instructions asked by the defendant. Is an individual land owner obliged to respond in damages for the death of a child occurring upon his premises under such circumstances as are developed by the testimony in this case? [The court answered this question in the affirmative.]

Second, a municipal corporation holding property as a private owner is chargeable with the same duties and obligations, which devolve on individuals. Where it owns, leases or controls lands, houses, docks,

¹ Statement of facts, arguments, and part of opinion omitted. — Ed.

piers, water and gas works, it is liable, in respect to the care of the same, for injuries arising from neglect, in the same manner as an individual owner is liable, and must respond in the same way for creating or suffering nuisances. Cooley on Torts, marg. pages 619, 620; 15 Am. & Eng. Enc. of Law, page 1155, and cases cited; *Mackey v. City of Vicksburg*, *supra*; *Clark v. Manchester*, *supra*.

Third, the plaintiff introduced in evidence, on the trial below, section 8 of the city ordinances of the city of Pekin which is as follows:

"8. Any owner or occupant or person in possession of any unenclosed lot or parcel of land in said city, who shall, by digging or removing earth, sand or gravel from any such lot or parcel of land, make or cause to be made in such unenclosed lot or parcel of land any pit or hole of such depth and character as to be considered dangerous, unsightly or a source of annoyance to the persons residing in the vicinity thereof or adjacent thereto, shall be deemed guilty of creating a nuisance; and any owner, occupant or possessor of any such unenclosed lot or parcel of land who shall refuse or neglect to remedy or abate said nuisance, by filling up or covering or securely fencing the same, after being notified so to do by the superintendent of police, or by any member of the police force, or any person aggrieved thereby, shall be subject to a penalty of not less than five dollars nor more than fifty dollars, and a further penalty of two dollars for every day, after the first conviction, that said nuisance shall by him be continued."

It is claimed, that the court erred in admitting this ordinance in evidence. The declaration alleged that defendant had negligently permitted large quantities of water to accumulate in the pit upon the lots in question, "so that the same became a nuisance and dangerous to the lives . . . of children of tender years," etc. The plea of the general issue had the effect of putting it at issue whether the excavation was a nuisance or not; and the ordinance was to some extent evidence of the affirmative of such issue. Moreover, in its notice of special matters of defense, the defendant had stated that the premises "were *nearly* enclosed upon the north and south sides thereof." Under the ordinance it was an owner's duty, after notice, to "*securely*," and not partially or ineffectually, fence the same. We are not satisfied that the admission of the ordinance injured the defendant. In connection with the other proof as to the character and condition of the excavation upon the lots, it had a tendency to show what the character and condition of the excavation ought to have been under the requirements exacted by the city itself of private owners of land. The City was thereby estopped from denying its duty under the circumstances.

HOLLMAN v. PLATTEVILLE. 183

1898. 101 Wis. 94.

BARDEEN, J.¹ . . . The only question we need determine is whether the defendants are liable in damages for the cutting of the trees on the cemetery lot in question. As we view the case, it becomes unnecessary to determine whether plaintiff has the legal title to the lot or not. He entered into possession of the same in 1867, inclosed it by a fence, and planted the trees that were cut down, and, after the fence was removed, has cared for and attended to the lot, "and has been in possession of the same, claiming it as a family burial lot," ever since. Whether his right thereto be considered a mere privilege, right, or easement for the burial of his dead, or whether his rights have ripened into absolute title by adverse possession, it matters not for the purpose of this case.

It is further urged that the city was engaged in an act for the public benefit, in which it had no particular interest, and from which it derived no special advantage in its corporate capacity, and therefore it cannot be held liable. The defendant city is a municipal corporation, charged with certain public duties in relation to the state and the public generally, as well as with obligations that are local and relate to the welfare of its members, and the regulation of its internal affairs. In the administration and execution of its legislative and governmental powers — such powers as are, in their very nature, public and in aid of the state — it sustains no liability to one suffering injury, if such powers are imperfectly or negligently executed. Dillon, Mun. Corp. §§ 965, 966. But, as respects the performance and execution of mere corporate duties, the rule is different. When the act done is within its charter powers and relates to the administration of local or internal affairs, as distinguished from its legislative, discretionary, or quasi-judicial duties, the rule of *respondeat superior* applies, and the city will become liable for the act of its servants and agents, which it has authorized or adopted. Dillon, Mun. Corp. § 980. In this case there can be no question but that the defendant *Stephens* was the servant of the city and was acting under its authority. The answer expressly admits that the acts done by him were done under the direction and authority of the common council. The city had a right to adopt reasonable regulations for the management and control of the cemetery. It also had the power to enforce its regulations in conformity to the law granting such power. It had no right or authority to disturb or invade the possession of the lot held by plaintiff except in pursuance of its statutory authority. Its fault lay in the attempted exercise of

¹ Facts, arguments, and part of opinion omitted. — Ed.

its statutory powers in an unlawful manner, and, having authorized the act done and having adopted the wrongful act of its servant, as appears by its answer, the city must be held to respond for the actual damage done. *Dillon*, Mun. Corp. § 972; *Wilde v. New Orleans*, 12 La. Ann. 15. See *Wilson v. Mineral Point*, 39 Wis. 160; *Thayer v. Boston*, 19 Pick. 511; *Squiers v. Neenah*, 24 Wis. 588; *Crossett v. Janesville*, 28 Wis. 420.

LITTLE v. HOLYOKE. 1814

1900. 177 Mass. 114.

HAMMOND, J. This is an action of tort for injuries suffered by the plaintiff in descending a flight of stairs. At the trial the defendant presented ten requests for instructions. In the argument before us it insists only upon the following, namely: 1. On all the evidence and the pleadings the plaintiff cannot recover, and the jury must find for the defendant. 2. There is no sufficient evidence that the plaintiff was in the exercise of due care, and the plaintiff cannot recover. 3. There is no sufficient evidence that the defendant was negligent, and the plaintiff cannot recover.

It was agreed at the trial that the defendant let this hall to the Woman's Relief Corps for the day and night in question, for hire, and furnished the lights; that the gallery was a part of the hall, and that the city furnished light and a janitor to take care of the hall.

Without reciting the evidence in detail it is sufficient to say we have examined it, and think that, in addition to the facts agreed upon as above stated, it would warrant a finding that the defendant occasionally let the large hall in the second story of the City Hall building for public gatherings and received pay therefor; that on the evening in question the hall was let for the purpose of an entertainment to be given by the lessee; that it was understood as a part of the bargain that the defendant should light and keep properly lighted the entry and stairs leading to the hall and to the gallery of the same; that the stairs leading to the gallery were not properly lighted, but that one at least of the lights was negligently allowed to go out, so that the winding part of the stairs was in comparative darkness; that the descent of the stairs under these circumstances was attended with danger; that the plaintiff, who had been in the gallery at the entertainment, in attempting to descend the stairs fell thereon and was injured; that she was at the time in the exercise of due care, and that the accident was due to the negligent failure of the defendant to keep the stairs properly lighted. It is true that the evidence was conflicting on many of these points, and perhaps a finding the other way might have been reasonably expected; but if the

jury made the findings in accordance with the foregoing statement of what the evidence warranted, then the case is one where a municipal corporation has engaged in a private enterprise for profit and has been negligent in the performance of a duty imposed upon it in the pursuit of that business, and the case is well within the principles laid down in *Oliver v. Worcester*, 102 Mass. 489, *Collins v. Greenfield*, 172 Mass. 78, 81, and *Marwedel v. Cook*, 154 Mass. 235, and the plaintiff may recover.

The exclusion of the evidence offered by the defendant to show that the stairs were well built, that winding stairs were a common and usual construction, that such stairs were suited to the peculiar construction of the building in that place, and that the stairs in question were safe and suitable, did not harm the defendant. The plaintiff did not claim that these stairs were improperly made for winding stairs, if winding stairs were to be in that place, but did claim that if such stairs were placed there they should be properly lighted. It was not a question whether winding stairs were improper, but whether at the time of the accident these stairs, in view of their construction, were properly lighted.

As stated by the judge in his charge to the jury, the contention of the plaintiff was that "this stairway was of such a construction and such a nature . . . that it was dangerous unless there was sufficient light to enable her to see and understand and appreciate what the danger was."

The evidence offered to show that the amount of rents was insufficient to pay the expense of maintaining the hall was properly excluded. It was of no consequence whether the business was profitable. *Collins v. Greenfield*, *ubi supra*.

It being conceded by the defendant that the hall was let by the defendant, no question as to the authority of the city clerk or any other city official inconsistent with that admission can be raised.

Exceptions overruled.

DAVOUST v. ALAMEDA. 185

1906. 149 Cal. 69.

MCFARLAND, J.¹ — This action is to recover damages for the death of plaintiff's wife alleged to have been caused by the negligence of defendant, the city of Alameda, in operating an electric-lighting plant owned by defendant, and used for the purpose of lighting said city and furnishing light to its inhabitants for domestic purposes. The trial court granted a nonsuit and gave judgment for defendant, and

¹ Part of the opinion and concurring opinion of SHAW, J., omitted. — Ed.

from this judgment plaintiff appeals. There is a bill of exceptions which presents the evidence and the rulings of the court.

It does not appear upon what ground the nonsuit was granted; but the main point argued by counsel for respondent is that because the defendant is a municipal corporation it is not liable to pay any damages, even though the death of plaintiff's wife was caused by the negligent operation of the electric plant. And in support of this contention respondent relies on *Winbigler v. City of Los Angeles*, 45 Cal. 36; *Denning v. State*, 128 Cal. 316, [55 Pac. 1000]; *Chope v. City of Eureka*, 78 Cal. 588, [21 Pac. Rep. 364, 12 Am. St. Rep. 113], and the cases there cited. These cases undoubtedly establish the rule in this state, although it has been held differently in some other jurisdictions, that a municipal corporation, when exercising governmental functions as an agent of the sovereign power, is not liable for damages caused by the negligence of its employees, unless it is expressly so made liable by statute. But this rule applies to a municipal corporation only when acting in its governmental, political, or public capacity as an instrumentality intrusted by the state with the subordinate control of some public affair. Such a corporation, however, has a double character—governmental, and also proprietary and private—and when acting in the latter capacity its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations. And while we have been referred to no case in this state where the proposition last stated was directly involved, yet in all the cases from this state cited by respondent the acts complained of were connected with the exercise of what has uniformly been held to be governmental functions, such as maintenance of public streets and roads, protection from fire, etc. However, the distinction has been frequently recognized and stated in the California decisions. In *Touchard v. Touchard*, 5 Cal. 307, the court say: "A corporation, both by the civil and common law, is a person, an artificial person; and although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons." In *San Francisco Gas Co. v. San Francisco*, 9 Cal. 469, Justice Field says: "The distinction alluded to refers to the double character of a municipal corporation; its public and political character in which it exercises subordinate and legislative powers, and its private character in which it exercises the powers of an individual or private corporation." In *Ukiah v. Ukiah W. and I. Co.*, 142 Cal. 179, [75 Pac. 775, 100 Am. St. Rep. 107], this court says: "The distinction between the powers conferred on municipal corporations for public purposes and for the general public good, and those conferred for

private corporate purposes, is clearly marked by the decisions." Citing cases. In *Denning v. State*, 123 Cal. 316, [55 Pac. Rep. 1000], it was held that the state was not liable for injury caused plaintiff by negligence of a board of harbor commissioners, because the latter were exercising purely governmental powers; but the distinction above mentioned was clearly stated. The court said, among other things, that the plaintiff, when injured, was employed in a distinct branch of the service, — "viz. the protection against or extinguishment of fires, which, even in the case of municipal corporations, is uniformly held to be the exercise of a purely governmental function; and there is certainly as strong ground for distinguishing between the different functions of the board as there can be for distinguishing between the different functions of a municipal corporation, in the exercise of some of which the corporation is liable for negligence, while in others it is not." See, also, *Holland v. San Francisco*, 7 Cal. 361; *Argenti v. San Francisco*, 16 Cal. 255; *Brown v. Board of Education*, 103 Cal. 531, [37 Pac. 503].

In other jurisdictions the rule that municipal corporations are liable like individuals and private corporations when the injury arises out of their exercise of mere proprietary and private rights has been extremely and frequently decided. Indeed, the rule has become text-book law. In *Dillon on Municipal Corporations* (sec. 66) the author, having said that a municipal corporation "possesses a double character; one governmental, legislative, or public; the other, in a sense, proprietary or private," proceeds as follows: "In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself; . . . but in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual." There are numerous authorities to the general point of the distinction between the governmental and the proprietary character of municipal corporations, but it will be sufficient here, on the general question, to refer to the opinion of the supreme court of Oregon in the case of *Esberg Cigar Co. v. Portland*, 34 Or. 282, [55 Pac. 961, 75 Am. St. Rep. 651], where the authorities are nearly all cited. See, also, *South Carolina v. United States*, 199 U. S. 437, [26 Sup. Ct. 110, 116].

And that the respondent, in maintaining and operating its electric plant, was exercising, not its governmental functions, but its proprietary and private rights, is entirely clear. There is obviously no distinction, so far as the law on the subject is concerned, between an electric plant for furnishing light, which is comparatively a new thing, and a gas plant maintained for the same purpose; and it has been directly held that a municipal corporation operating a gas plant is liable

for injury caused by its careless management. In *Dillon on Municipal Corporations* (sec. 954) it is said: "A municipal corporation owning waterworks or gasworks which supply private consumers on the payment of tolls is liable for the negligence of its agents and servants the same as like private proprietors would be"; and ample authority is cited sustaining the text. In *Western S. F. Society v. Philadelphia*, 31 Pa. 183, [72 Am. Dec. 730], the Supreme Court of Pennsylvania say: "The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise. . . . The whole investment is the private property of the city, as much so as the lands and houses belonging to it. . . . It [the city] stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." In *San Francisco Gas Co. v. San Francisco*, 9 Cal. 469, the court say: "The purchase of gas involves only the exercise of a power of a private corporation; it requires no exercise of any political power. It is as much an act of a private character as if made by a private corporation." In *Esberg Cigar Co. v. Portland*, 33 Or. 282, [55 Pac. 961, 75 Am. St. Rep. 651], the facts were that the city of Portland owned and maintained a system of waterworks, and the plaintiff therein brought the action for damages for injuries caused by the negligent management of the said waterworks; and it was contended for defendant "that the waterworks belonged to the city in its public or governmental capacity, and it therefore is not liable in a common-law action for negligence in constructing or maintaining the same." But the court held otherwise, and, after alluding to the distinction above stated, said: "In accordance with this distinction it is quite universally held that when a municipal corporation voluntarily undertakes to construct and maintain water or gas works in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water or gas at rates established by the city, it is liable for an injury in consequence of its acts in constructing and maintaining such works, the same as a private corporation or individual." And surely this principle applies as fully to the maintenance of an electric-lighting plant as to the maintenance of waterworks. In the case at bar, the city of Alameda was merely given the optional privilege of constructing and maintaining an electric-lighting plant; no duty was imposed on it to do so. Our conclusion on the main point above discussed is that the respondent cannot escape liability for the negligence averred in the complaint on the ground that it is a municipal corporation.¹

¹ See *Rhobidas v. Concord*, 70 N. H. 90, 47 Atl. 82, 85 Am. St. Rep. 604, 51 L. R. A. 381.

LIBBY v. PORTLAND. 186

1909. 105 Me. 370.

CORNISH, J. Action on the case for personal injuries alleged to have been sustained by the plaintiff by reason of the defective condition of the basement step of a building belonging to the defendant. The writ contains two counts. A general demurrer was filed to each count. The presiding Justice overruled both demurrers and the defendant alleged exceptions. If either count sets forth a cause of action, the exceptions must be overruled.

The first count alleges in substance that the defendant was the lawful owner and in the lawful possession, control and management of a certain farm with the buildings thereon which it was operating in the usual method of husbandry and that "all of said buildings, land and other property were then and there used by the said defendant for its own emolument, profit and advantage." It nowhere alleges or even intimates that this was a poor farm and that the building, where the injury was received, was a city almshouse. The second count is based squarely on the allegation of an almshouse, in the maintenance of which negligence is charged. It is necessary to consider the allegations of the first count alone, the objection to which on the part of the defendant is that the alleged negligence appears to have resulted from the performance of ultra vires acts by the city and that the city cannot be held liable in the performance of such acts. This leads us to a brief consideration of the rights, powers, duties and liabilities of municipal corporations in this State.

In the absence of any special rights conferred or liabilities imposed by legislative charter, towns and cities act in a dual capacity, the one corporate, the other governmental. To the former belongs the performance of acts done in what may be called their private character, in the management of property or rights held voluntarily for their own immediate profit and advantage as a corporation, although ultimately inuring to the benefit of the public, such as the ownership and management of real estate, the making of contracts and the right to sue and be sued; to the latter belongs the discharge of duties imposed upon them by the Legislature for the public benefit, such as the support of the poor, the maintenance of schools, the construction and maintenance of highways and bridges, and the assessment and collection of taxes. This distinction is sharply defined in a long line of decisions of which it is necessary to cite only the following: *Eastman v. Meredith*, 36 N. H. 284; *Oliver v. Worcester*, 102 Mass. 489; *Small v. Danville*, 51 Maine, 359; *Bryant v. Westbrook*, 86 Maine, 450. The Revised Statutes recognize this twofold character, ch. 4, sec. 1, making the inhabitants of each town a body corporate, and ch. 1, sec. 1, making towns a subdivision of the State.

The precise question is whether the city of Portland acting in its corporate capacity could lawfully own, control and manage a farm house within its limits, disconnected from any public use, and for its own emolument, profit and advantage.

1. It may be conceded that a city or town would not have the right to raise money by taxation for the purchase of such a farm any more than for the establishment of manufactories, *Opinion of Justices*, 58 Maine, 590, or for the erection of buildings for the purpose of renting them as stores, or banks, or halls. *French v. Quincy*, 3 Allen, 9.

But it does not follow that a city or town might not be the lawful and legal owner of a farm or of a block of rentable buildings and might not as such owner maintain the same for its pecuniary advantage.

Suppose, by way of illustration, that the municipal officers of a town bid in, in behalf of the town, real estate sold for non-payment of taxes, as they are authorized to do by R. S., c. 10, sec. 85. It is clearly the purpose of the statute that the title shall vest in the town, if the statutory proceedings have been complied with and the property is not redeemed by the owner. Such vesting of title confers upon the town all the ordinary incidents of lawful ownership, among which is the right to use and utilize. Must the town, although the lawful owner, yet because it is a town, let the property, if land, lie fallow, or if buildings, remain vacant and unrented? Such a hollow result cannot be the purpose of the statute.

Suppose again that some benefactor should convey by deed, or devise by will, such real estate to the town as a gift, would not the title vest and would not the town be authorized to manage and maintain the property for profit until some other disposition of it might be deemed advisable? Gifts of real estate should stand on no different basis than gifts of money, and certainly the treasury would be lawfully enriched by such benefactions, in either form.

The authorities so hold. Dillon on Municipal Corp., Vol. 2, sec. 566, states the principle thus: "Municipal and public corporations may be the objects of public and private bounty. This is reasonable and just. They are, in law, clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character rest upon compact populations residing within restricted and narrow limits, to meet which, property and revenues are absolutely necessary, and, therefore, legacies of personal property, devises of real property, and grants or gifts of either species of property directly to the corporation for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten the burdens of its citizens, are, in the absence of disabling or restraining statutes, valid in law."

There is no such disabling statute in this State, but on the contrary cities and towns are expressly authorized to receive and carry out the terms of conditional gifts, R. S., c. 4, sec. 80 and 81, and of trust

funds, R. S., c. 4, sec. 82-85. The necessity of express action on the part of the municipality in fulfilling the conditions of such gifts and trusts rendered necessary the passage of an enabling statute. But in the absence of any prohibiting statute, such municipality in its corporate capacity may receive and hold gifts of either real or personal estate. 2 Abbott Mun. Corp., sec. 720, while questioning the doctrine as an academic proposition admits it to be the law of the decisions.

Worcester v. Eaton, 18 Mass. 371, was a real action based upon a deed of real estate to the town in consideration that the grantor should be supported during her natural life, and the point was raised in defense that the town could not take the premises as grantees. In overruling this defense the court say: "With respect to the capacity of the demandants to take by purchase and to hold real estate, we cannot deny to towns such right, since by the immemorial usage of the country, it appears to have been an incident to their corporate powers. As early as the year 1679, provision was made by a colonial act respecting lands, woods, &c. owned by towns in their corporate capacity; and authority was given to the inhabitants, by vote of the major part, to dispose of the same by grant of lots for settlement, and it is well known that many towns, at this day, are owners of real estate, which they hold in their corporate capacity, other than such as may be necessary to erect school-houses and other public buildings upon. Whether the inhabitants of a town can be assessed, to raise money for the purchase of lands, to be used for any other purpose than the execution of some lawful requisition, is a different question. But there seems to be no reason why there may not be a gift or a devise to the inhabitants."

This case has been cited with approval in *Oliver v. Worcester*, 102 Mass. 489, and *Commonwealth v. Wilder*, 127 Mass. 1, the court affirming in the last case that "there is no provision in the statute forbidding towns to hold real estate for any particular purposes."

New Shoreham v. Ball, 14 R. I. 566, was an action of ejectment, the plaintiff town in proof of title adducing evidence of possession for more than twenty years. The defendant contended that the town could not acquire title by possession for any other than municipal purposes, but the court speaking through Chief Justice Durfee held otherwise in these words: "The cases cited in support of the exceptions do not go to the point that a town cannot acquire land by possession for other than municipal purposes, but only to the point that it is ultra vires for a town to purchase land for other than such purposes. We think this is quite a different proposition; for a town cannot purchase land without expending its moneys, and it has no right to expend its moneys, raised by taxation or otherwise for municipal purposes, for other purposes. The acquirement of land by possession does not involve an expenditure any more than does the acquirement of land by deed of gift or by devise; and it has been decided that a gift or devise of land to a town is good, even though the land be given

or devised in general terms, and be accepted without any intent to use it directly for municipal purposes. . . . Land so given, even when not wanted for municipal purposes, may be applied by sale or lease to the alleviation of municipal burdens."

This same principle has been recognized frequently in the decisions of this court. *Marston v. Scarborough*, 71 Maine, 267; *Camden v. Village Corporation*, 77 Maine, 530-535; *Bulger v. Eden*, 82 Maine, 852; *Keeley v. Portland*, 100 Maine, 260-265.

Moreover the charter of the City of Portland expressly provides that the city council "shall have the care and superintendence of city buildings and the custody and management of all city property with power to let or sell what may be legally let or sold; and to purchase and take, in the name of the city, such real or personal property . . . as they may think useful to the public interest." Sec. 4, chap. 248 of Spec. L. 1832, sec. 7, ch. 275, Sp. Laws, 1863. The "custody and management of all city property" must include all to which the city has title, and not simply what is taken or purchased for municipal purposes.

2 From this proposition of lawful ownership follows another that is equally well settled, viz., That a city or town holding property for its own profit or gain is liable for negligence in its management to the same extent that business corporations or individuals would be.

"When this legal condition exists, the public corporation may, by the exercise of an express or an assumed power, acquire property in this capacity; and where this is done it will be treated as a private corporation and subject to all the rules of law, regulating rights and liabilities as devolving upon a private individual. . . . Its rights and its liabilities are measured strictly by the laws which determine all private rights and liabilities." 2 Abb. Mun. Corp., sec. 720.

Woodward v. Boston, 115 Mass. 81, was an action of tort brought to recover damages for the alleged conversion of a building that had been sold at auction by the city to the plaintiff. The court say: "In the sale of this building the city acted, in its capacity as a proprietor in the management of property held for its profit and advantage as a corporation, and as to it, has substantially the same rights and liabilities as a private individual." See also *Oliver v. Worcester*, 102 Mass. 489-500; *Hill v. Boston*, 122 Mass. 344-359; *Haley v. Boston*, 191 Mass. 291-292; *Savannah v. Cullins*, 38 Ga. 334.

The decision in *Moulton v. Scarborough*, 71 Maine, 267, must rest squarely on this principle. That case came to this court on demurrer to the declaration in which the plaintiff alleged that the defendant town was guilty of negligence in the management of a certain ram owned and controlled by it. Like the case at bar the declaration was barren of any allegation or intimation that the property was used in connection with the farm maintained by the town for the support of the poor. Counsel for defendant in that case sharply contended that "a town cannot own property, except when necessary to aid in the

performance of duties imposed on it by law. For a town to be 'owner and possessor of a ram' otherwise than in the line of its statutory duties, is ultra vires." The language of the court in answer to this contention is this: "It is not claimed in support of the demurrer that the declaration is defective; but it is contended in behalf of the defendants, that the town had no legal authority to own and keep a ram; that the act was ultra vires, and that, therefore, the town is not liable. It is admitted, however, by the defendants' counsel, that if the town could legally own and keep the ram for any corporate purpose, for profit and gain, then it rests under the same liability as a person or private corporation for its proper care and control. This is the well settled rule of law."

The opinion then discusses the right of a town to maintain a farm for the support of the poor and to stock it for ordinary farm purposes, and holds the declaration good. Later cases have cited this decision with approval. *Bulger v. Eden*, 82 Maine, 352; *Sibley v. Lumbering Assoc.*, 93 Maine, 399-402; *Keeley v. Portland*, 100 Maine, 260-265. In this last case, after considering the non-liability of a municipal corporation to a private action for neglect to perform, or negligent performance of, corporate duties imposed upon it by the legislature, unless such liability to action has been given by statute, the court adds: "It is true there are limitations to this rule, or conditions to which it is not applicable, the most important perhaps of which is this: A municipal corporation lawfully owning and controlling property not in the performance of a public duty enforced upon it by law, but wholly or partially for its own profit or gain, is liable for negligence in the management of such property to the same extent as business corporations or individuals must be."

The municipality as proprietor is not to be confounded with the municipality as legislator or custodian for the public welfare. If a building is maintained solely for a public purpose no liability on the part of the city arises for accidents in connection therewith; excavation in school house yard, *Bigelow v. Randolph*, 14 Gray, 541; unsafe stairway in school building, *Hall v. Boston*, 122 Mass. 344; defective heating apparatus in school building, *Wixon v. Newport*, 13 R. I. 454; unsafe floor in town house, *Eastman v. Meredith*, 36 N. H. 284. But when property is used or business is conducted by a city principally for public purposes under the authority of law, but incidentally and in part for profit, the city is liable for negligence in management. Thus, for injury sustained in falling through a trap door in a hall let for hire, in a city building, *Worden v. New Bedford*, 131 Mass. 23; or because of insufficient lighting of the approaches to such hall, *Little v. Holyoke*, 177 Mass. 114; where the town engaged in crushing stone and repairing road for a street railway company, *Collins v. Greenfield*, 172 Mass. 78; where the town used a stone quarry in part for the public streets and in part for the sale of stone, *Duggan v. Peabody*, 187 Mass. 349. The liability in the cases last

cited is created when public use gives way to use for private gain. *Larrabee v. Peabody*, 128 Mass. 561. If then a city is liable for accidents in a part of a public building used for private gain it must certainly be liable when the entire building is so used. And the same rule would apply to any other property lawfully held and maintained for private gain whether it be a hall, a business block or a farm house.

The cases cited by the defendant do not reach the point under consideration. They involved acts clearly ultra vires, as the construction of an embankment across two channels of a stream in *Anthony v. Adams*, 1 Met. 284; the digging of a ditch across the land of a private individual in *Steele v. Deering*, 79 Maine, 343; and the maintenance of a public ferry in *Hoggard v. Monroe*, 51 La. Ann. 683, 44 L. R. A. 477.

Our conclusion therefore is that since the City of Portland may be "the lawful owner and in the lawful possession, control and management" of the property in question and may be liable for "negligence in connection with the maintenance thereof for its own emolument, profit or advantage," and since these facts duly alleged in the declaration are admitted to be true by the demurrer, the first count sets forth a cause of action and the demurrer thereto was properly overruled.

Exceptions overruled.

CHAPTER VI.

REMEDIES.

HORNER v. COFFEY.

1853. 25 Mississippi, 434.¹

6 cases.

Individual citizens

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FISHER, J. This case is before us upon an appeal from a decree of the vice-chancery court at Natchez.

The only point presented by the record for adjudication is, whether the individual property of the appellee, one of the selectmen and an inhabitant of the town of Grand Gulf, is liable to levy for the purpose of satisfying a judgment against the president and selectmen of said town in their corporate capacity.

The seventh section of the act of the legislature, incorporating the town of Grand Gulf, says: "That the said president and selectmen are constituted a body politic and corporate in fact; and in the name of the town of Grand Gulf, and by that name, they and their successors in office shall have perpetual succession, shall have a common seal, may purchase, hold, and convey property; and by the name and style aforesaid, shall be persons capable in law of suing and being sued in all manner of suits or actions, either at law or in equity," — "and may do all other acts incident to bodies corporate."

The tenth section of the act, gives the president and selectmen power to raise a revenue for town purposes, by taxing such property as is liable to taxation under the existing laws of this state, "Provided such tax shall not exceed twenty-five cents on every hundred dollars' worth of such property in any one year." Acts of 1838, 96, 97. These being the only provisions of the charter bearing upon the question under consideration, it will at once appear, that it contains no express provision in regard to the right asserted by the appellant, to resort to the individual property of the inhabitants of the town, for the purpose of discharging her judgment against the corporation. Hence we must look alone to the common law for the rules to guide us in our decision.

With respect to private corporations, such as banks or insurance companies, it is conceded, that no individual responsibility attaches to

¹ Statement and arguments omitted. — Ed.

the members for the corporate debts. "A different rule prevails," say some of the authorities, "with regard to the inhabitants of any district; as counties or towns incorporated by statute, which come under the head of *quasi* corporations; for against them no private action will lie unless given by statute; and if a power to sue them is given by statute, each inhabitant is liable to satisfy the judgment." Angell & Ames on Corp. 498, 499. The same rule is more broadly stated by the supreme court of Connecticut, in the case of *Beardsley v. Smith*, 16 Conn. R. 368. The court on that occasion used the following language: "We know, that the relation in which the members of municipal corporations in this State have been supposed to stand in respect to the corporation itself, as well as to its creditors, has elsewhere been considered in some respects peculiar. We have treated them, for some purposes, as parties to corporate proceedings, and their individuality has not been considered as merged in their corporate connection. Though corporators, they have been holden to be parties to suits by or against the corporation, and individually liable for its debts." "Such corporations are of a public and political character; they exercise a portion of the governing power of the State. Statutes impose upon them important public duties. In the performance of these, they must contract debts and liabilities, which can only be discharged by a resort to individuals, either by taxation or execution. Taxation in most cases can only be the result of the voluntary action of the corporation, dependent upon the contingent will of a majority of the corporators, and upon their tardy and uncertain action. It affords no security to creditors, because they have no power over it."

The same doctrine, in language equally strong, has been, in repeated decisions, announced by the supreme court of Massachusetts, and it is, perhaps, now the settled law of all the New England States.¹ In view of the numerous authorities, emanating from judicial tribunals as enlightened as those of the New England States, thus settling the law, we have been induced to give the question involved in the case before us a much more thorough examination than it otherwise would have received at our hands. This examination has only served to strengthen the opposition which we from the first conceived against the rule, as well as the principles upon which it has been settled by the authorities cited. We submit with all proper deference and respect, that neither position assumed by the court in the case of *Beardsley v. Smith* can be sustained by any principle of the common law, in reference to the inhabitants of the town of Grand Gulf. These positions are, first, that the inhabitants of the town are parties to all suits by or against the corporation; and, secondly, the charter authorizing a suit against the corporation, the inhabitants are personally liable to discharge the judgment when obtained.

¹ The constitutionality of a statute permitting the judgment-creditor of the town to levy upon the individual property of the inhabitants, was affirmed in *Eames v. Savage*, 77 Maine, 212. — ED.

In regard to the first position, the suit was in this instance against the corporation. The record shows no other defendant. Hence, if the inhabitants were parties to the suit, they became such by operation of law. Before the law will make, or even presume a man to be a defendant to a suit against another, he must be shown to have been a party to the cause of action upon which it is founded. Were the inhabitants of the town of Grand Gulf parties to the cause of action in this instance? and if so, was it their own act, or that of the corporation, that made them such? If of the corporation, had it power to perform the act? The tenth section of the charter already noticed furnishes a conclusive answer to these several inquiries. It prescribes the manner in which, and the extent to which the corporation must act and may go in this respect. The statute prescribing the mode in which an act must be performed, is a negative upon all other modes for performing it. Whence it is manifest that the inhabitants of the town were not parties to the cause of action. They could not, therefore, be parties to the suit, for the plain reason that they had violated no legal duty. A suit is but a remedy given by law to enable a party who has been injured by the act or violation of duty by another, to recover damages equal to the injury or loss sustained. If the duty never existed, it could not be violated; and without both its existence and violation, there was no ground for a suit against the inhabitants of the corporation.

But there is still another light in which this question may be presented. If the doctrine be true, that the inhabitants of an incorporated town are by operation of law parties to all suits by or against such corporation, then it follows, that however just his claim may be, an inhabitant could not, under any circumstances, either maintain a suit or enforce a judgment against the corporation. The moment he appears as a plaintiff on the record, the law makes him a defendant jointly with the corporation in the same action. And if he should be so fortunate as to escape a plea in abatement, or a demurrer, if the fact appeared of record, and obtain his judgment, his own property would be as much liable as that of any other inhabitant, to satisfy the execution. This shows to what the doctrine must lead, and, consequently, its utter absurdity.

We will now proceed to consider the second question stated in Angell and Ames, in this language, to wit: "If a power to sue the corporation is given by statute, each inhabitant is liable to satisfy the judgment." This doctrine, in certain cases, is unquestionably correct; but it has no application to a corporation like that of the town of Grand Gulf, or the city of Bridgeport, spoken of in *Beardsley v. Smith*. The rule is this; that whenever either the common law or a statute requires the inhabitants of a particular district of country, such as a county town or hundred in England, to perform certain duties, and they fail in this respect, in consequence of which a statute authorizes a suit by the party injured against the inhabitants, then the judgment in such case may be wholly satisfied out of the property of any one of said inhabitants. This

is all according to reason and the principles of the common law. The duty required was, in the first instance, joint and several. Every inhabitant was bound to aid in its performance. All were implicated in its violation, which occasioned the suit. The judgment, in being also joint and several, only partook of the nature of the cause of action upon which it was founded. This was the operation of judgments recovered under the statute of Winton, till its amendment by the act of 49d Elizabeth, which required such judgments to be satisfied by a tax levied equally upon the inhabitants of the hundred.

Here, as we humbly conceive, lies the error into which these learned tribunals have fallen, in not properly discriminating between a duty, in the performance of which the law required every man in the particular district to aid, and for a breach of which all were liable, and a mere power delegated to a corporation for certain specified purposes.

The charter, in this instance, only requires the inhabitants of the town to perform such obligations as the corporate authorities may legally impose upon them. The only obligation which could be thus imposed, is the tax provided for in the tenth section. A failure to impose this tax, or a failure to pay it by the inhabitants, does not make them liable to a judgment against the corporation, for the plain reason that it constituted no cause of action in the first instance. A judgment is only the means provided by law to enable the creditor to get that to which he was entitled before judgment. A creditor could not maintain a suit against any or all of the inhabitants, merely because they were liable to pay a certain tax, and had failed to pay it. Upon what principle, then, can he resort to their property, for the purpose of discharging a judgment against the corporation, to which they are not parties, and against whom a recovery could not have been had, even if they had been parties?

But it is said, that the corporation exercised a portion of the governing power of the State, and, therefore, could exercise its discretion in creating liabilities against the inhabitants of the town. It is true, that the corporation is invested with a subordinate political power, but it is only such as is expressly granted by the charter.

To this extent the inhabitants of the town only agreed to submit to the jurisdiction of the corporation, and the additional burdens which it might impose. Thus acting, it is the creature of law, and can never oppress those under its jurisdiction. Without this restraint its power is arbitrary and despotic, and may be used by the corporate authorities for their own selfish purposes.

The whole case must at last turn upon the question, whether the corporation in its action must be confined strictly to the grants contained in the charter, or whether it may exercise an unlimited authority over the inhabitants of the town. If we adhere to the first position, the case for the appellant cannot even be made plausible under the charter. The corporation possessed no authority to make the people of the town parties to the cause of action, or to the suit, or to make their property liable to the judgment, except in the shape of a tax.

It makes no difference, that the appellee is one of the selectmen. He is only one of seven, and could not alone either levy or enforce a tax under the charter. If he has failed to perform his duty as a corporator, the law gives a remedy against him as well as the others by *mandamus*, to compel them to levy the tax named. He can only be known in the present controversy as an individual, and his rights as such determined.

There is no judgment in the record from which an appeal could be prosecuted. The case will, therefore, be dismissed.

SUPERVISORS OF ROCK ISLAND v. U. S. EX REL. STATE BANK.

1866. 4 Wallace (U. S.), 435.¹

ERROR to U. S. Circuit Court for Northern District of Illinois.

A statute of Illinois, of February 16, 1863, enacts as follows:

"The board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed in any one year one per cent. upon the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes, and when collected to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court or board of supervisors, as the case may be, in liquidation of such indebtedness."

At March Term, 1863, the relators recovered judgment against the County of Rock Island upon certain overdue coupons. Nothing was paid upon the judgment, and there was no money in the county treasury which could be so applied.

The relator subsequently requested the supervisors to collect the requisite amount by taxation, and to give him an order on the county treasury for payment. They declined to do either.

He then applied to the court below for a mandamus, compelling the supervisors, at their next regular meeting, to levy a tax of sufficient amount to be applied to pay the judgment, interest, and costs, and when collected to apply it accordingly. An alternative writ was issued.

The supervisors made a return, averring, *inter alia*, that they had levied and collected the regular county taxes, and that the same had all been needed and used for the ordinary current expenses of the county.

¹ Statement abridged. Arguments omitted. — Ed.

1868
Mandamus issued to
supervisors to
levy tax
merely says
"may".

The court below disallowed the return, and ordered that a peremptory writ should issue, commanding the respondents, at their next meeting for levying taxes, to levy a tax of not more than one hundred cents on each one hundred dollars' worth of taxable property in the county, but of sufficient amount fully to pay the judgment, interest, and costs; and that they set the same apart as a special fund for that purpose; and that they pay it over without unnecessary delay to the relator.

Cook, for the plaintiffs in error.

James Grant, contra.

SWAYNE, J. [After overruling other objections, and after quoting the statute of Feb. 16, 1863.] The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language, "*may, if deemed advisable,*" which accompanies the grant of power, and, as he contends, qualifies it to the extent assumed in his argument.

In *The King v. The Inhabitants of Derby*,¹ there was an indictment against "divers inhabitants" for refusing to meet and make a rate to pay "the constables' tax." The defendants moved to quash the indictment, "because they are not compellable, but the statute only says that *they may*, so that they have their election, and no coercion shall be." The court held that "*may*, in the case of a public officer, is tantamount to *shall*, and if he does not do it, he shall be punished upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt."

In *The King and Queen v. Barlow*,² there was an indictment upon the same statute, and the same objection was taken. The court said: "When a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*: thus, 23 Hen. VI, says the sheriff *may* take bail. This is construed he *shall*, for he is compellable to do so."

These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the settled law of both countries.

In *The Mayor of the City of New York*³ and in *Mason v. Fearson*,⁴ the words "it shall be lawful" were held also to be mandatory.⁵

The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us,

¹ Skinner, 370.

² 2 Salkeld, 609.

³ 3 Hill, 614.

⁴ 9 Howard, 248.

⁵ See *The Attorney-General v. Locke*, 3 Atkyns, 164; *Blackwell's case*, 1 Vernon, 152; *Dwarris on Stat.* 712; *Malcom v. Rogers*, 5 Cowen, 188; *Newburg Turnpike Co. v. Miller*, 5 Johnson's Chancery, 113; *Justices of Clark County Court v. The P. & W. & K. R. T. Co.*, 11 B. Monroe, 143; *Minner et al. v. The Merchants' Bank*, 1 Peters, 64; *Com. v. Johnson*, 2 Binney, 275; *Virginia v. The Justices*, 2 Virginia Cases, 9; *Ohio ex rel. v. The Governor*, 5 Ohio State, 53; *Coy v. The City Council of Lyons*, 17 Iowa, 1.

or in equivalent language — whenever the public interest or individual rights call for its exercise — the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose "a positive and absolute duty."

The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category.¹

The Circuit Court properly awarded a peremptory writ of mandamus. We find no error in the record. The judgment below is

Affirmed.

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VON HOFFMAN v. CITY OF QUINCY.

1866. 4 Wallace, 535.²

ERROR to U. S. Circuit Court for Southern District of Illinois.

Petition for *mandamus*.

The relator was the owner of overdue coupons, which, when issued, were attached to bonds issued by the city in payment for railroad stock, subscribed for by the city under certain statutes, passed in 1851, 1853, and 1857.

By the provisions of these several acts the city was authorized to collect a special annual tax upon the property, real and personal, therein, sufficient to pay the annual interest upon any bonds there-after issued by the city for railroad purposes, pursuant to law. It was required that the tax, when collected, should be set aside, and held separate from the other portions of the city revenue, as a fund specially pledged for the payment of the annual interest upon the bonds aforesaid. It was to be applied to this purpose, from time to time, as the interest should become due, "and to no other purpose whatsoever."

The city failed to pay the coupons held by the relator for a long time after they became due, and refused to levy the tax necessary for

¹ The People v. Sup. Court, 5 Wendell, 125; The People v. Sup. Court, 10 Wendell, 289; The People v. Vermilyea, 7 Cowen, 393; Hull v. Supervisors, 19 John, 260.

² Statement abridged. Arguments omitted. Only part of the opinion is given. — Ed.

Where K for sp. tax, limiting taxing power of city, is void as impairs remedy under K clause.

that purpose. The relator sued the city upon them in the court below and at the June Term, 1863, recovered a judgment for \$22,206.69 and costs. An execution was issued and returned unsatisfied. The judgment was unpaid. The city still neglected and refused to levy the requisite tax. He therefore prayed that a writ of *mandamus* be issued, commanding the city and its proper officers to pay over to him any money in their hands otherwise unappropriated, not exceeding the amount of the judgment, interest, and costs; and, for want of such funds, commanding them to levy the special tax as required by the acts of the legislature before referred to, sufficient to satisfy the judgment, interest, and costs, and to pay over to him the proceeds.

The city filed an answer relying on the act of Feb. 14, 1863, which contains the following provisions:

"Section 4. The city council of said city shall have power to levy and collect annually taxes on real and personal property within the limits of said city as follows: [After providing for taxation for certain special purposes:] On all real and personal property within the limits of said city, to pay the debts and meet the general expenses of said city, not exceeding fifty cents on each one hundred dollars per annum on the annual assessed value thereof.

"Section 5. All laws and parts of laws, other than the provisions hereof, touching the levy or collection of taxes on property within said city, except those regulating such collection, and all laws conflicting herewith are hereby repealed; . . ."

The answer averred that the full amount of the tax authorized by this act had been assessed, and was in the process of collection; that the power of the city in this respect has been exhausted: "and that the said fifty cents on the one hundred dollars, when collected, will not be sufficient to pay the current expenses of the city for the year 1864, and the debts of the said city."

The relator demurred to the answer, and judgment was given against him.

McKinnon and Merrick, for plaintiff in error.

Cushing and Ewing, Jr., contra.

SWAYNE J. . . . The Constitution of the United States declares (Art. I. s. 10), that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof

of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement.¹

Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.

It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void.²

If these doctrines were *res integra* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy — or, to speak more accurately, between the remedy and the other parts of the contract — might perhaps well be doubted.³ But they rest in this court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this court render the distinction one rather of form than substance.

When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.

¹ *Green v. Biddle*, 8 Wheaton, 92; *Bronson v. Kinzie*, 1 Howard, 319; *McCracken v. Hayward*, 2 Id. 612; *People v. Bond*, 10 California, 570; *Ogden v. Saunders*, 12 Wheaton, 231.

² *Bronson v. Kinzie*, 1 Howard, 311; *McCracken v. Hayward*, 2 Id. 608.

³ 1 Kent's Commentaries, 456; Sedgwick on Stat. and Cons. Law, 652; Mr Justice Washington's dissenting opinion in *Mason v. Hail*, 12 Wheaton, 379.

It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases.¹ It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other.²

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract, but an abstract right — of no practical value — and render the protection of the Constitution a shadow and a delusion.

The Circuit Court erred in overruling the application for a *mandamus*. The judgment of that court is REVERSED, and the cause will be remanded, with instructions to proceed

In conformity with this opinion.

STATE EX REL. MARCHANT v. CITY OF NEW ORLEANS. 190

1885. 37 Louisiana Annual, 13.³

APPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Blanc and Butler, for the relators and appellees.

C. F. Buck, City Attorney, *contra*.

FENNER, J. In 1872, the Legislature of the State passed Act No. 60 of that year, by which it established the Luzenberg Hospital in this city as the exclusive hospital for small-pox and further provided that "all indigent cases of small-pox, or other diseases reported contagious, in want of or making application for hospital aid or care, shall be sent to the hospital designated in this act, at the expense of the city of New Orleans, as usual and at the usual *per diem*."

Acting under this direction, the city entered into a contract with Dr. Anfoux then in charge of said hospital by which he was to receive and treat such patients at a stipulated compensation of thirty-five dollars

¹ New Jersey v. Wilson, 7 Cranch, 166; Dodge v. Woolsey, 18 Howard, 331; Piqua Branch v. Knoop, 16 Id. 331.

² People v. Bell, 10 California, 570; Dominic v. Sayre, 3 Sandford, 555.

³ Arguments omitted. — Ed.

per case. During the year 1873 he received and treated a large number of cases, for which the amount due by the city under the contract was \$19,670.

In 1878 suit was brought and judgment recovered against the city on the foregoing cause of action and for the amount above stated, with interest and costs.

The judgment thus rendered was duly registered July 5th, 1878, pursuant to the provisions of Act No. 5, of 1870. This registration has produced no results; the judgment has not been paid; and the evidence makes it manifest that under the city's construction of its duties under the Act No. 5, and under its modes of execution thereof, many years must elapse before any payment will be made upon this judgment.

The reason why this debt remains, and promises to remain, unpaid, is that the city construes her power and duty of taxation to be governed and limited by the provision of the Constitution of 1879 to a tax of ten mills on the dollar, in so far as provision for such judgments is concerned, and that the requirements for her alimony leave, out of the receipts from this tax, nothing or little to be appropriated to the satisfaction of judgments.

To this the creditor answers that he is a creditor by contract; that, at the date of his contract, the city possessed, by law, a power of taxation for "current city expenses exclusive of interest and schools" only limited to one and one-quarter *per cent.*; that *quoad* this contract obligation and so far as necessary for its satisfaction, this power of taxation still exists unaffected by subsequent legislative or constitutional provisions; that, under the Act No. 5 of 1870, it is the duty of the city authorities to provide for the payment of his registered judgment by setting apart in the annual budget a sum for that purpose, and that, in order to execute this duty, the correlative duty is imposed of exercising the power of taxation vested in the city by law to the extent necessary to raise the means to make such provision.

In pursuance of these views, the present suit was instituted for a mandamus directing the city authorities to execute and perform the duties imposed by the Act No. 5 of 1870; and, in accordance therewith, to set apart in the next annual budget sufficient money to pay such judgment; and further directing them to provide in said budget, by taxation for current city expenses, in excess of the amount allowed by law for the alimony of the city but not in excess of one and one-quarter *per cent.*, the means of revenue necessary to pay relator's said judgment, and so to do, in all succeeding annual budgets, until the same be paid.

From a judgment making the mandamus peremptory, the city has appealed.

We lay down the following propositions of fact and law viz. :

- 1st. The judgment was founded on a contract entered into in 1872.
- 2d. At the date of the contract, the city possessed a power of taxa-

tion for general expenses "exclusive of interest and schools," of twelve and one-half mills *per annum*. See Act No. 73 of 1872, Sec. 15.

3d. Under the consistent jurisprudence of the Supreme Court of the United States and of this Court, the power of taxation existing at the date of the contract is read into the contract and continues to exist, so far as necessary for the enforcement of the obligations of the contract, irrespective of any subsequent legislation or constitutional enactments restricting the power of taxation. *State ex rel. Moore vs. City*, 32 Ann.; *State ex rel. Dillon vs. City*, 34 Ann. 477; *State ex rel. Carriere vs. City*, 36 Ann.; *Von Hoffman vs. Quincy*, 4 Wall. 535; *Wolff vs. New Orleans*, 103 U. S. 358; *Nelson vs. St. Martin*, 111 U. S. 720.

4th. This Court has long since held that the prohibitions against the issuance of the writ of mandamus against officers of the city of New Orleans contained in Act No. 5 of 1870, apply only to the cases therein specially designated and that, for the performance of the duties imposed by that act itself, the writ of mandamus was a proper remedy. *State ex rel. Carondelet vs. New Orleans*, 30 Ann. 129.

5th. In the same case it was held that, under Act No. 5 of 1870, it is the "plain duty" of the city authorities "to provide for the payment of registered judgments in the only mode in which judgment creditors of the city are permitted to collect their judgments. This requires the action of the Mayor and Administrators, in their aggregate capacity as a municipal government; the adoption of the annual budget; the levy of the necessary taxes; and a setting apart of a sufficient amount to pay this and other registered judgments. * * The duty of the city to make this provision is not discretionary as to time or manner. The law imperatively requires that it shall be in the next annual budget, and by setting apart, appropriating a sufficient amount out of the annual revenues." *State ex rel. Carondelet vs. New Orleans*, 30 Ann. 129.

This duty, we have held, however, is subordinate to the higher and absolute duty of first providing, out of the revenues applicable to that purpose, for the necessary alimony or support of the city. *State ex rel. Moore vs. City*; *Saloy vs. City*.

6th. In the DeLeon case we held that the duty to appropriate and set apart money in the annual budget for particular purposes "involved necessarily the duty to levy such tax (within the power of taxation possessed, at the time, by the corporation) as will render possible the performance of the duty." *State ex rel. DeLeon vs. City*, 34 Ann., p. 477.

7th. The relator herein claims and is entitled to no special tax. He is simply entitled to payment out of the revenues arising from the collection of taxes provided for the general expenses of the city. He simply asks that the power of taxation conferred by law for that purpose shall be exercised to the extent necessary to furnish the means out of which his judgment may be paid.

So far as relator's contract and judgment are concerned, we have

already shown that the city possesses a power of taxation for general purposes of twelve and one-half mills. She has, heretofore, exercised, and proposes hereafter to exercise this power only to the extent of *ten mills* on the dollar, and, as the revenues arising from this tax are applicable to, and required for, the necessary alimony of the city, they leave, as we have said, little or nothing, which can be appropriated for the payment of registered judgments.

From the foregoing statement, it appears that, to the extent necessary for the provision for payment of plaintiff's judgment, the city possesses a residuary power of taxation of two and one-half mills, not exercised and which she refuses to exercise, the revenues from which would, under no circumstances, be applicable to the city's alimony, or, indeed, to any other purpose than that of satisfying relator's judgment and others standing in like case with it. It would be, indeed, an anomaly, if the city could escape from or postpone her clear duty, to provide for the satisfaction of such judgments, by simply abstaining from the exercise of lawful powers of taxation to an extent necessary to provide the means of paying them. Such an anomaly could never be sanctioned by any court of justice, since it would render the payment of debts no longer obligatory upon municipal corporations, but dependent purely upon their will and caprice.

From the foregoing considerations it would conclusively appear that relators are entitled to the relief which they seek, unless there is something in the nature of their debt, or in the law existing at the date of their contract, which debars it. Legislation subsequent to the contract has, and can have, no effect upon the rights and obligations arising from the contract.

The learned counsel for the city propounds two special defenses based upon the nature of plaintiff's debt and the law in existence at the date of the contract.

1st. He contends that, from the very nature and constitution of municipal corporations, they are incapable of creating or contracting a debt for current expenses, in excess of the revenues arising from taxation, within the limitations imposed by law, for the year in which the debt was created; and that such debt, whether created by contract or not, can only demand satisfaction out of the revenues of that year.

If such had been the law of Louisiana, as applicable to the city of New Orleans, in 1873, it is passing strange that, in 1874, it should have been deemed necessary to pass a constitutional amendment establishing the very principles which, it is contended, already existed and were inherent in the very nature of the corporation.

We have rigidly enforced the constitutional amendment of 1874, as applicable to debts created after its passage. *Taxpayers vs. New Orleans*, 33 Ann. 568.

But when we are asked to recognize the principles established by that amendment as existing independent of it and prior to its passage, and as applicable to debts contracted prior thereto, we must pause.

The proposition is supported by no authority and by no well founded reason. It is contradicted by the entire financial administration of the city prior to 1874, by the uniform current of judicial interpretation which has constantly rendered and enforced judgments upon such obligations without restriction to the revenues of particular years, and by the terms and spirit of the Act No. 5 of 1870 itself.

For what would be the sense of requiring the city authorities to provide in coming budgets for registered judgments, without distinction, if such judgments could only seek satisfaction out of the revenues of some antecedent year in which the debts were contracted? We dismiss the proposition as utterly untenable.

Nor is there anything in the nature of the debt which prevents this contract from being protected from impairment under the Constitution of the United States. The protection afforded by that instrument is not restricted to bonds or any particular forms of contract. It covers all contracts. Every lawful contract of a municipal corporation is entitled to satisfaction by the exercise of the power of taxation possessed by the corporation at its date, to the extent necessary, and to invoke the continued and repeated exercise of that power until the debt is satisfied.

Such is the clear and unequivocal doctrine announced by the Supreme Court of the United States uniformly and specially in the very recent case of Nelson vs. St. Martin, 111 U. S. 716.

We are not called upon to consider the rights of other judgment creditors whose judgments rank that of relators in order of registry. The record does not advise us whether their judgments are based on contracts or whether they rest upon causes of action arising prior to the constitutional amendment of 1874. It may be that none of them can compete with relators in the relief sought. But, at all events, the unexhausted power of taxation is ample to satisfy all; and if they are entitled to like rights with relators and have neglected to exercise them, there is no reason why relators should suffer.

Let it be well understood that the duty to levy an extra tax is not obligatory under this decree. The city may satisfy the debt out of its revenues under the existing rate of taxation. But the insufficiency of such revenues will be no excuse for not satisfying the judgment and, if necessary, and *only* if necessary, must provision be made by a tax for general expenses above ten mills and within twelve and one-half mills.

Judgment affirmed.

Rehearing refused.

BERMUDEZ, C. J., and POCHÉ, J., take no part in this opinion and decree.

REES v. CITY OF WATERTOWN. ✓ 191

1873. 19 Wallace (U. S.), 107.¹

APPEAL from the Circuit Court for the Western District of Wisconsin; the case being thus:

Rees, a citizen of Illinois, being owner of certain bonds issued under authority of an act of the legislature of the State of Wisconsin, by the city of Watertown, in that State, to the Watertown and Madison Railroad Company, and by the company sold for its benefit, brought suit in the Circuit Court of the United States for the District of Wisconsin, against the city, and, in 1867, recovered two judgments for about \$10,000.

In the summer of 1868 he issued executions upon the two judgments thus obtained, which were returned wholly unsatisfied.

In November of the same year he procured from the United States Circuit Court a peremptory writ of mandamus, directing the city of Watertown to levy and collect a tax upon the taxable property of the city, to pay the said judgments; but before the writ could be served, a majority of the members of the city council resigned their offices. This fact was returned by the marshal, and proceedings upon the mandamus thereupon ceased.

In May, 1869, another board of aldermen having been elected, Rees procured another writ of mandamus to be issued, which writ was served on all of the aldermen except one Holger, who was sick at the time of the service upon the others. No steps were taken to comply with the requisition of the writ. An order to show cause why the aldermen should not be punished for contempt, in not complying with its requirements, was obtained, and before its return day six of the aldermen resigned their offices, leaving in office but one more than a quorum, of whom the said Holger, upon whom the writ had not been served, was one. Various proceedings were had and various excuses made, the whole resulting in an order that the aldermen should at once levy and collect the tax; but before the order could be served on Holger, he resigned his office, and again the board was left without a quorum. Nothing was accomplished by their effort in aid of the plaintiff, but fines were imposed upon the reculant aldermen, which were ordered to be applied in discharge of the costs of the proceedings.

In October, 1870, the plaintiff obtained a third writ of mandamus, which resulted as the former ones had done, and by the same means, on the part of the officers of the city. A special election was ordered to be held to fill the vacancies of the aldermen so resigning, but no votes were cast, except three in one ward, and the person for whom they were cast refused to qualify. The general truth of these facts was not denied. No part of the debt was ever paid.

¹ Statement abridged. Argument and part of opinion omitted. — Ed.

Can't reach
individual prop.
of citizens
in 1869.

Rees v. City of Watertown
1873. 19 Wallace (U. S.), 107.
1867. 19 Wallace (U. S.), 107.
1868. 19 Wallace (U. S.), 107.
1869. 19 Wallace (U. S.), 107.
1870. 19 Wallace (U. S.), 107.

1111

In this state of things, the district of Wisconsin having been divided into an eastern and a western district, and the city of Watertown being in the latter, Rees brought suit in the latter district on his judgments obtained in the general district before the division, and got a new judgment upon them for \$11,066.

He now filed a bill in the said western district, setting forth the above facts, the general truth of which was not denied; that the debt due to him had never been paid, and that, with an accumulation of fourteen years' interest, the same remained unpaid, and that all his efforts to obtain satisfaction of his judgments had failed. All this was equally undenied.

The bill set forth also certain acts of the legislature of Wisconsin, which, it was alleged, were intended to aid the defendant in evading the payment of its debts, and which, it seemed sufficiently plain, had had that effect, whatever might have been the intent of the legislature passing them.

The bill alleging that the corporate authorities were trustees for the benefit of the creditors of the city, and that the property of the citizens was a trust fund for the payment of its debts, and that it was the duty of the court to lay hold of such property and cause it to be justly applied, now prayed that the court would subject the taxable property of the city to the payment of the judgments. It asked specifically that a decree might be made, subjecting the taxable property of the citizens to the payment of the complainant's judgments, and that the marshal of the district might be empowered to seize and sell so much of it as might be necessary, and to pay over to him the proceeds of such sale.

The charter of the city contains the following provision:

"Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation or contract of said city."

The judges holding the Circuit Court were divided in opinion upon the questions argued before them. The bill was dismissed. The case was now here on certificate of division and appeal, the error assigned being that the court dismissed the bill, when it ought to have given the relief prayed for.

H. W. and D. W. Tenney (S. U. Pinney with them), for the creditor appellant.

D. Hall (M. H. Carpenter and H. L. Palmer with him), contra.

HUNT, J. . . . We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place

of a State in the exercise of this authority at once so delicate and so important. The question is not entirely new in this court.

[After referring to authorities upon the power of the court to direct the levy of a tax under the circumstances of this case.]

The plaintiff insists that the court may accomplish the same result under a different name, that it has jurisdiction of the persons and of the property, and may subject the property of the citizens to the payment of the plaintiff's debt without the intervention of State taxing officers, and without regard to tax laws. His theory is that the court should make a decree subjecting the individual property of the citizens of Watertown to the payment of the plaintiff's judgment; direct the marshal to make a list thereof from the assessment rolls or from such other sources of information as he may obtain; report the same to the court, where any objections should be heard; that the amount of the debt should be apportioned upon the several pieces of property owned by individual citizens; that the marshal should be directed to collect such apportioned amount from such persons, or in default thereof to sell the property.

As a part of this theory, the plaintiff argues that the court has authority to direct the amount of the judgment to be wholly made from the property belonging to any inhabitant of the city, leaving the citizens to settle the equities between themselves.

This theory has many difficulties to encounter. In seeking to obtain for the plaintiff his just rights we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of \$20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its proportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of law, even in regard to taxation. The block of buildings we have supposed is liable to taxation only upon its value in proportion to the value of the entire property, to be ascertained by assessment, and when the proportion is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources. There may be repeated taxes and assessments to make up delinquencies, but the principle and the general rule of law are as we have stated.

In relation to the corporation before us, this objection to the liability of individual property for the payment of a corporate debt is presented in a specific form. It is of a statutory character.

The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money

for the payment of these bonds would be void.¹ But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted he has no cause of complaint.²

By section nine of the defendant's charter it is enacted as follows: "Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation, or contract of said city."

If the power of taxation is conceded not to be applicable, and the power of the court is invoked to collect the money as upon an execution to satisfy a contract or obligation of the city, this section is directly applicable and forbids the proceeding. The process or order asked for is in the nature of an execution; the property proposed to be sold is that of an inhabitant of the city; the purpose to which it is to be applied is the satisfaction of a debt of the city. The proposed remedy is in direct violation of a statute in existence when the debt was incurred, and made known to the creditor with the same solemnity as the statute which gave power to contract the debt. All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other.³

But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge Story says,⁴ "There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate," of which he cites many instances. Lord Talbot says,⁵ "There are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by

¹ Van Hoffman v. City of Quincy, 4 Wallace, 535.

² Cooley, Constitutional Limitations, 285, 287.

³ Cooley, Constitutional Limitations, 285.

⁴ 1 Equity Jurisprudence, § 61.

⁵ Heard v. Stanford, Cases Tempore Talbot, 174.

law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows."

Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. With the subjects of fraud, trust, or accident, when properly before it, it can deal more completely than can a court of law. These subjects, however, may arise in courts of law, and there be well disposed of.¹

A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in chapter twenty-ninth of Magna Charta and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law — that is, he must be served with notice of the proceeding, and have a day in court to make his defence.²

"Due process of law (it is said) undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."³ In the New England States it is held that a judgment obtained against a town may be levied upon and made out of the property of any inhabitant of the town. The suit in those States is brought in form against the inhabitants of the town, naming it; the individual inhabitants, it is said, may and do appear and defend the suit, and hence it is held that the individual inhabitants have their day in court, are each bound by the judgment, and that it may be collected from the property of any one of them.⁴ This is local law peculiar to New England. It is not the law of this country generally, or of England.⁵ It has never been held to be the law in New York, in New Jersey, in Pennsylvania, nor, as stated by Mr. Cooley, in any of the Western States.⁶ So far as it

¹ 1 Story's Equity Jurisprudence, § 60.

² *Westervelt v. Gregg*, 12 New York, 209.

³ *Ib.*

⁴ See the cases collected in Cooley's Constitutional Limitations, 240-245.

⁵ *Russel v. Men of Devon*, 2 Term, 667.

⁶ See *Emeric v. Gilman*, 10 California, 408, where all the cases are collected.

rests upon the rule that these municipalities have no common fund, and that no other mode exists by which demands against them can be enforced, he says that it cannot be considered as applicable to those States where provision is made for compulsory taxation to satisfy judgments against a town or city.¹

The general principle of law to which we have adverted is not disturbed by these references. It is applicable to the case before us. Whether, in fact, the individual has a defence to the debt, or by way of exemption, or is without defence, is not important. To assume that he has none, and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest.

Again, in the case of *Emeric v. Gilman*, before cited, it is said: "The inhabitants of a county are constantly changing; those who contributed to the debt may be non-residents upon the recovery of the judgment or the levy of the execution. Those who opposed the creation of the liability may be subjected to its payment, while those, by whose fault the burden has been imposed, may be entirely relieved of responsibility. . . . To enforce this right against the inhabitants of a county would lead to such a multiplicity of suits as to render the right valueless." We do not perceive, if the doctrine contended for is correct, why the money might not be entirely made from property owned by the creditor himself, if he should happen to own property within the limits of the corporation, of sufficient value for that purpose.

The difficulty and the embarrassment arising from an apportionment or contribution among those bound to make the payment we do not regard as a serious objection. Contribution and apportionment are recognized heads of equity jurisdiction, and if it be assumed that process could issue directly against the citizens to collect the debt of the city, a court of equity could make the apportionment more conveniently than could a court of law.²

We apprehend, also, that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established

¹ Cooley's Constitutional Limitations, 246.

² 1 Story's Equity Jurisprudence, § 470 and onwards.

remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York combinations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution.

Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we should be quite willing to give him the aid requested if the law permitted it. We cannot, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed.

Judgment affirmed.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice SWAYNE, dissenting :

I dissent from the opinion of the court in this case upon the ground that equity will never suffer a trust to be defeated by the refusal of the trustee to administer the fund, or on account of the misconduct of the trustee, and also because the effect of the decree in the court below, if affirmed by this court, will be to give judicial sanction to a fraudulent repudiation of an honest debt. For which reasons, as it seems to me, the decree of the subordinate court should be reversed.

THOMPSON v. ALLEN COUNTY ET ALs. 172

1885. 115 U. S. 550.¹

APPEAL from U. S. Circuit Court for District of Kentucky.

Bill in equity. The case was tried on bill, answer, exceptions to answer, and a stipulation as to the facts.

Plaintiff had recovered judgment against Allen County on coupons for interest on bonds, issued by the county under authority of an act of the legislature to pay for subscription to railroad stock. Executions were returned "no property found." The act under which the bonds were issued provided that the County Court should levy a tax for "a

¹ Statement abridged. Portions of opinions omitted. — Ed.

R for sp. tax
see page 10
tax collector
not to be

sum sufficient to pay the interest on such bonds as it accrues, together with the costs of collecting the same." The act, as amended, also required the County Court to appoint a special collector to collect all taxes levied under it. The U. S. Circuit Court, at the instance of the present plaintiffs, issued a writ of mandamus to the justices of the Allen County Court, under which they levied a tax to pay the plaintiff's judgment. They also elected one Stork collector of said tax levy, but he refused to give bond or to accept the office. The County Court in good faith and diligently endeavored to find a proper person to act as collector, but no proper person could be found who would undertake that office. The parties now agree that the plaintiff is without remedy for the collection of his debt, except through the aid of the U. S. Circuit Court in the appointment of a receiver, as prayed for in the bill, or other appropriate order of the court.

The bill in equity gives the names of about thirty of the principal tax-payers of the county, with the value of the assessed property of each, and the amount of tax due from him under said levy, alleging that the tax-payers were too numerous to be sued, and praying that these might be sued as defendants representing all others in like circumstances, and be required, with the county, to answer the bill.

Receiver
1. d

The prayer of the bill for relief was, that, inasmuch as the complainant was without remedy at law, the court sitting in chancery would appoint a receiver, who should collect these taxes, and that the money arising therefrom be from time to time paid over in satisfaction of plaintiff's judgments, and that the several tax-payers of said county, made defendants, be required to pay into court, with like effect the sums due by them as alleged in the bill.

The justices in the Circuit Court were divided in opinion. In accordance with the view of the presiding judge, the bill was dismissed. (13 Federal Reporter, 97.) An appeal was taken.

Charles Eginton, (W. O. Dodd with him,) for appellant.

John Mason Brown, (Alexander P. Humphrey and George M. Davie, with him,) for appellees.

MILLER, J. . . . The cases in which it has been held that a court of equity cannot enforce the levy and collection of taxes to pay the debts of municipal corporations began with *Walkley v. City of Muscatine*, 6 Wall. 481.

In that case, the complainant Walkley had procured judgments against the city of Muscatine for interest on bonds of the city, executions had been returned "*nulla bona*," the mayor and aldermen had refused to levy a tax for the payment of the judgments, and had used the annual tax for other purposes and paid nothing to plaintiff.

Walkley then filed his bill in equity praying a decree that the mayor and aldermen be compelled to levy a tax and appropriate so much of its proceeds as might be necessary to pay his judgments.

This court said, by Mr. Justice Nelson, that the remedy was by mandamus at law, and "we have been furnished with no authority

for the substitution of a bill in equity and injunction for the writ of mandamus," p. 483; and he adds, that "a court of equity is invoked as auxiliary to a court of law in the enforcement of its judgments only when the latter is inadequate to afford the proper remedy," pp. 483-4.

By inadequacy of the remedy at law is here meant, not that it fails to produce the money — that is a very usual result in the use of all remedies — but that in its nature or character it is not fitted or adapted to the end in view.

[The learned Judge then refers to *Rees v. Watertown*, 19 Wallace, 107, and other cases; and gives an extract from WAITE, C. J., in *Meriwether v. Garrett*, 102 U. S. 472, ending with the following sentence: "Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it."]

But though the question was not then decided, and it is urged upon us now, we see no more reason to hold that the collection of taxes already assessed is a function of a court of equity than the levy or assessment of such taxes. A court of law possesses no power to levy taxes. Its power to compel officers who are lawfully appointed for that purpose, in a case where the duty to do so is clear, and is strictly ministerial, rests upon a ground very different from and much narrower than that under which a court of chancery would act in appointing its own officer either to assess or collect such a tax.

In the one case the officers exist, the duty is plain, the plaintiff has a legal right to have these officers perform that duty for his benefit, and the remedy to compel this performance, namely, the writ of mandamus, has been a well known process in the hands of the courts of common law for ages. In the other there exists no officer authorized to levy the tax or to collect it when levied. The power to enforce collection when the tax is levied, or to cause it to be levied by existing officers, is a common-law power, strictly guarded and limited to cases of mere ministerial duty, and is not one of the powers of a court of chancery. It would require in this court, not the compulsory process against some existing officer to make him perform a recognized duty, but the appointment by the court of such an officer and a decree directing him what to do.

In the one case, his power proceeds from the law, and he is compelled to exercise it; in the other, it proceeds from the court which first makes its own decree, and makes an officer to enforce it. No such power has ever yet been exercised by a court of chancery. The appointment of its own officer to collect taxes levied by order of a common-law court is as much without authority, as to appoint the same officer to levy and collect the tax. They are parts of the same proceeding, and relate to the same matter. If the common-law court

can compel the *assessment* of a tax, it is quite as competent to enforce its *collection* as a court of chancery. Having jurisdiction to compel the assessment, there is no reason why it should stop short, if any further judicial power exists under the law, and turn the case over to a court of equity. Its sheriff or marshal is as well qualified to collect the tax as a receiver appointed by the court of chancery.

The difficulty is that no power exists in either court to fill the vacancy in the office of tax collector; and the case of *Lee County Supervisors v. Rogers*, 7 Wall. 175, where the laws of the State of Iowa expressly authorized the court to enforce its writ of mandamus by making such appointment, the only case in which it has ever been done, shows that without such legislative authority it cannot be done.

It is the duty of the marshals of the Federal courts and the sheriffs of State courts to levy executions issuing from these courts on the property of defendants, and sell it, to raise money to pay their judgments. Let us suppose that, for some reason or other, the office of marshal or sheriff became vacant for a while. Would that authorize the court of equity of the Federal or State government to appoint a sheriff or marshal? or to appoint a receiver to levy the execution? or, if it had been levied, to sell the property, collect the purchase-money, and pay it to plaintiff? If this cannot be done, if it never has been done, why can it do a much more unjudicial act, by appointing a collector to collect the taxes, or, what is still less appropriate, appointing a receiver, and endow him with that power?

To appoint a marshal or a sheriff to execute the process of a court to enforce the judgment of that court, is not such a wide departure from the judicial function as to appoint a receiver to collect taxes; but no case has been cited of the exercise of even the former power by the court, much less the appointment, by a court of chancery, of an officer to execute the processes of a court of law. The appointment of special masters or commissioners to make sales under decrees in chancery, is the ordinary mode of that court to enforce its decrees in cases where the court has jurisdiction of the subject matter of the suit.

Not only are the decisions here reviewed of our own court clearly opposed to the exercise of this power by the court of equity, but the decisions of the highest court of the State of Kentucky are equally emphatic. It is the powers derived from the statute law of that State under which alone this tax can be collected. The issue of the bonds on which the judgment was obtained was by virtue of a special statute, and that statute prescribed the mode of levying and collecting this tax.

It enacted that its collection should not be by the sheriff who collected the ordinary taxes for the State and county, but that a special tax collector should be appointed for that purpose by the justices of the County Court who levied the tax. The Court of Appeals, construing this statute, which was in existence when the bonds were issued, holds that no other officers but these can collect the taxes, and has decided, both in reference to this law and the Constitution of the State, that a

court of chancery cannot appoint such an officer or exercise this function of tax collector. *McLean County Precinct v. Deposit Bank*, 81 Ky. 254.

This decision, if not conclusive, is entitled to great weight as construing the statute under which alone this tax can be levied and collected.

These considerations require that the answers to each of the three questions certified to us by the judges of the Circuit Court be in the negative, and that the decree of that court dismissing the bill be

Affirmed.

HARLAN, J., dissenting. [After stating the case, and referring to various authorities relied on in the majority opinion.]

These cases only establish the doctrine that the levying of taxes is not a judicial function.

It seems to me that the granting of relief to Thompson will not, in any degree, disturb the principles announced in the foregoing cases. The bill does not ask the court to usurp the function of *levying* taxes. That duty has been performed by the only tribunal authorized to do it, viz., the County Court of Allen County. Nothing remains to be done, except to collect from individuals specific sums of money which they are under legal obligation to pay. The collections of these sums will not interfere with any discretion with which the Allen County Court is invested by law; for, by its own order, made in conformity with the law of the State, and by the judgment in the mandamus proceedings, the sums due from the individual defendants, and from other tax-payers, have been set apart for the payment of Thompson's judgments. Those sums, when collected, cannot be otherwise used. As the County Court cannot find any one who will accept the office of special collector, and as the parties agree that there is no mode of collecting the sums set apart in the hands of the individual defendants and other tax-payers, for the payment of Thompson, I am unable to perceive why the Circuit Court, sitting in equity, may not cause these sums to be applied in satisfaction of its judgments at law. The plaintiff has no remedy at law; for, the common-law court in rendering judgment has done all that it can do, and the local tribunal, by levying the required tax and seeking the aid of a special collector to collect it, has done all that it can do. There is no suggestion, or even pretence, that the tax-payers who are sued dispute the regularity of the assessment made against them by the County Court. Admitting their legal liability for the specific amounts assessed against them, and conceding that what they owe must, when paid, go in satisfaction of Thompson's judgments, they dispute the authority of any judicial tribunal to compel them to pay it over. With money in their hands, equitably belonging to the judgment creditor, they walk out of the court whose judgments remain unsatisfied, announcing, in effect, that they will hold negotiations only with a "special collector," who has no existence.

That the court below, sitting in equity — after it has given a judgment at law for money, and after a return of *nulla bona* against the debtor — may not lay hold of moneys set apart, *by the act of the debtor*, in the hands of individuals *exclusively for the payment of that judgment*, and which money, the parties agree, cannot be otherwise reached than by being brought into that court, under its orders, is a confession of helplessness on the part of the courts of the United States that I am unwilling to make. I, therefore, dissent from the opinion and judgment in this case.

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